92-571

Supreme Court, U.S.
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No.

In the Supreme Court of the United States

OCTOBER TERM, 1992

PAINEWEBBER INCORPORATED,
Petitioner,

v.

BANKATLANTIC,
Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 90-5142

BANKATLANTIC, a federal savings bank,
f/k/a Atlantic Federal Savings and Loan Association of
Ft. Lauderdale,

Plaintiff-Counterclaim
Defendant-Appellee,

versus

BLYTHE EASTMAN PAINE WEBBER, INC.,

Defendant-Counterclaim
Plaintiff-Appellant.

No. 90-5162

BANKATLANTIC, A Federal Savings Bank
f/k/a Atlantic Federal Savings & Loan Association
of Ft. Lauderdale,

Plaintiff-Appellant,

versus

BLYTHE EASTMAN PAINE WEBBER, INC.,
n/k/a PAINEWEBBER,

Defendant-Appellee.

No. 90-5776

BANKATLANTIC, A Federal Savings Bank
f/k/a Atlantic Savings & Loan Association
of Ft. Lauderdale,
Plaintiff-Appellant,

versus

BLYTHE EASTMAN PAINEWEBBER, INC.,
Defendant-Appellee.

No. 90-5979

BANKATLANTIC, A Federal Savings Bank
f/k/a/ Atlantic Federal Savings & Loan Association
of Ft. Lauderdale,
Plaintiff-Appellee,

versus

BLYTHE EASTMAN PAINE WEBBER, INC.,
Defendant-Appellant.

On Appeal from the United States District Court for the Southern District of Florida

BEFORE: EDMONDSON and DUBINA, Circuit Judges, and ATKINS*, Senior District Judge.

PER CURIAM:

BankAtlantic's Petition for Rehearing is denied.
ENTERED FOR THE COURT:

United States Circuit
Judge

* Honorable C. Clyde Atkins, Senior U.S. District Judge for the Southern District of Florida, sitting by designation.

BANKATLANTIC, a federal savings bank, f/k/a Atlantic Federal Savings and Loan Association of Ft. Lauderdale, Plaintiff-Counterclaim Defendant-Appellee,

v.

BLYTHE EASTMAN PAINE WEBBER, INC., Defendant-Counterclaim Plaintiff-Appellant.

BANKATLANTIC, A Federal Savings Bank f/k/a Atlantic Federal Savings & Loan Association of Ft. Lauderdale, Plaintiff-Appellant,

v.

BLYTHE EASTMAN PAINE WEBBER, INC., n/k/a Painewebber, Defendant-Appellee.

BANKATLANTIC, A Federal Savings Bank f/k/a Atlantic Federal Savings & Loan Association of Ft. Lauderdale, Plaintiffs-Appellees,

v.

BLYTHE EASTMAN PAINE WEBBER, INC., Defendant-Appellant.

Nos. 90-5142, 90-5162, 90-5776 and 90-5979.

United States Court of Appeals,
Eleventh Circuit.

March 23, 1992.

Savings and loan association sued financial advisor which had also served as broker in "interest rate swaps." The United States District Court for the Southern District of Florida, No. 87-6643 Civ-TES, Thomas E. Scott, J., entered judgment on jury verdict for broker and, 130 F.R.D. 153, denied association's motion for new trial. Association appealed, and broker appealed from judgment on pleadings entered against it on its counterclaim

and from denial of its motion for sanctions and attorney fees. The Court of Appeals, Atkins, Senior District Judge, sitting by designation, held that: (1) evidence supported jury's determination that broker did not breach fiduciary duty or engage in negligence or fraud; (2) extrinsic evidence in form of newspaper article read by jury foreman did not pose reasonable possibility of prejudice, and association was not entitled to new trial on basis of other grounds asserted; (3) Florida's "economic loss rule" did not bar association's tort claims; and (4) district court properly interpreted indemnity provision to apply only to third-party claims.

Affirmed.

1. Federal Courts ⇦ 765

Court reviewing order denying motion for entry of judgment notwithstanding verdict (j.n.o.v.) applies the same standard used by district court when considering motions for directed verdict or for j.n.o.v.

2. Federal Courts ⇦ 799

Court determining whether record contains substantial evidence supporting jury verdict must view evidence, and all logical inferences therefrom, in light most favorable to appellee.

3. Brokers ⇦ 38(4)

Evidence supported jury's determination that broker for savings and loan association did not breach fiduciary duty or commit negligence or fraud by failing to disclose risks associated with "interest rate swaps," its relationship with counterparty to swaps, or counterparty's financial problems; savings and loan was aware of those risks and of that relationship, and counterparty was

creditworthy so broker did not have to advise association to obtain collateral.

4. Federal Civil Procedure ⇦ 2334

Extrinsic evidence in form of newspaper article read by jury foreman, containing extraneous information about savings and loan association and its chairman and information on association's litigation with minority shareholder which had been excluded as evidence from trial, did not pose reasonable possibility of prejudice to association so as to entitle it to new trial in its suit against broker in interest rate swaps.

5. Federal Civil Procedure ⇦ 2337

To obtain new trial based on inaccurate juror responses during voir dire, party must first demonstrate that juror failed to answer honestly material question on voir dire and then further show that correct response would have provided valid basis for challenge for cause; first prong of test requires determination of whether juror was aware of fact that his answers were false, and second prong requires showing of actual bias.

6. Federal Civil Procedure ⇦ 2337

Savings and loan association was not entitled to new trial based on jurors' allegedly false responses during voir dire in its suit against broker in interest rate swaps, including one juror's concealment of fact that he was employed by law school classmate of one of broker's trial counsel and the other juror's concealment of several criminal convictions and entry of civil judgment against him; there was no express admission of actual bias, and jurors were not closely connected to case or to either party.

7. Federal Courts ⇦ 823

In reviewing evidentiary determinations, Court of Appeals will not disturb district court's rulings absent clear showing of abuse of discretion.

8. Federal Civil Procedure ⇦ 2651

Standard for determining whether jury verdict should be set aside as result of misconduct of counsel is whether conduct was such as to impair gravely the calm and dispassionate consideration of case by jury.

9. Federal Civil Procedure ⇦ 2332

Savings and loan association suing broker in interest rate swaps was not entitled to new trial based on broker's alleged attack on association's chairman during direct examination and closing argument through introduction of evidence of chairman's compensation, reference to chairman as "corporate raider," and claim that chairman had "cooked the books" to hide association's losses from swaps so that $3 million dividend could be paid to him personally.

10. Federal Courts ⇦ 823

Decision to admit or exclude expert testimony is matter within district court's discretion and will not be reversed unless it is manifestly erroneous.

11. Federal Civil Procedure ⇦ 2334

District court's decision to admit testimony of broker's expert in suit by savings and loan association arising out of interest rate swaps was not manifestly erroneous and did not require new trial; record reflected no "intractable conflict" between expert's trial testimony and her earlier deposition, and association was able to use

that deposition during cross-examination and had full and fair opportunity to establish any inconsistencies.

12. Federal Civil Procedure ⇦ 2011

District judges have broad discretion with respect to admissibility of evidence.

13. Witnesses ⇦ 389

When witness admits making prior inconsistent statement, extrinsic proof of statement is excludable.

14. Evidence ⇦ 558(7)

District court could refuse to admit in evidence draft of article that expert witness had written which allegedly contained statements that were inconsistent with her trial testimony; at trial, expert admitted having made statements in article but explained that they were consistent with her testimony.

15. Action ⇦ 27(1)

Under Florida "economic loss rule," party to contract cannot raise tort claims to recover solely economic damages flowing from breach of contract unless tort is independent of contract breach.

See publication Words and Phrases for other judicial constructions and definitions.

16. Action ⇦ 27(5)

Florida's economic loss rule did not bar savings and loan's tort claims against broker in interest rate swaps, as swaps were not encompassed in contract that association entered into with broker.

17. Federal Courts ⇦ 776

Contract interpretation is legal question subject to de novo review by Court of Appeals.

18. Indemnity ⇦ 15(9)

Construction of indemnity agreement generally is question of law for court applying generalized principles of contract construction.

19. Indemnity ⇦ 9(2)

District court properly interpreted indemnity provision in agreement between savings and loan association and broker in interest rate swaps to apply only to third-party claims and properly dismissed broker's counterclaim for attorney fees accordingly.

20. Costs ⇦ 2
Federal Civil Procedure ⇦ 2771(2)

Broker in interest rate swaps was not entitled to sanctions and attorney fees under Florida statute or federal Rule 11 in suit by savings and loan association. West's F.S.A. § 57.105; Fed.Rules Civ.Proc.Rule 11, 28 U.S.C.A.

John H. Schulte, Paul McMahon, Jorden, Schulte & Burchette, Miami, Fla., for Blythe Eastman Paine Webber, Inc.

Eugene E. Stearns, Bradford Swing, Miami, Fla., for Bankatlantic.

Appeals from the United States District Court for the Southern District of Florida.

Before EDMONDSON and DUBINA, Circuit Judges, and ATKINS*, Senior District Judge.

ATKINS, Senior District Judge:

BankAtlantic appeals from a judgment entered on a jury verdict and from denial of two post-trial motions relating to juror misconduct. Blythe Eastman Paine Webber Inc., n/k/a PaineWebber Inc. ("PaineWebber"), appeals from a judgment on the pleadings entered against it on its counter-claim and from denial of its motion for sanctions and attorney's fees. We find sufficient evidence to sustain the jury's verdict, no abuse of discretion in the denial of BankAtlantic's motions for new trial, 130 F.R.D. 153, and PaineWebber's motion for sanctions, and no error in granting judgment on the pleadings in favor of BankAtlantic on PaineWebber's counterclaim. Accordingly, we AFFIRM.

A. BACKGROUND

BankAtlantic is a federally chartered savings and loan institution. At the time of this litigation, it was one of the largest savings and loan institutions in Florida and in the United States. In 1984, BankAtlantic retained PaineWebber as a financial advisor to assist it in blocking several hostile takeover attempts. PaineWebber also served as a broker in two transactions known as interest rate swaps.[1] Based on PaineWebber's recommendation, BankAtlantic entered into the two interest rate swaps

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* Honorable C. Clyde Atkins, Senior U.S. District Judge for the Southern District of Florida, sitting by designation.

[1] An interest rate swap is an agreement by which one party agrees to pay the counterparty a fixed rate of interest on a notional amount for a specified period of time. In return, the counterparty agrees to pay the first party an adjustable rate of interest on the same notional amount for the same period of time.

with Homestead Savings ("Homestead") in an effort to hedge its adjustable rate deposit payables against an increase in interest rates. Alleging non-performance under the agreement, BankAtlantic terminated the services of PaineWebber as financial advisor and employed another firm to assist with the interest rate swaps. During this time, interest rates were falling drastically, allegedly causing BankAtlantic to suffer losses in excess of $30 million.

In August 1987, BankAtlantic brought suit against PaineWebber alleging these losses were caused by PaineWebber's failure to disclose the risks involved in interest rate swaps, e.g., that if interest rates fell, the high yielding fixed rate mortgages would be prepaid as borrowers refinanced. BankAtlantic also alleged that PaineWebber failed to disclose its extensive relationship with Homestead, that Homestead was not creditworthy and therefore that BankAtlantic should have obtained collateral from Homestead. The complaint alleged breach of contract,[2] breach of fiduciary duty, fraud, fraudulent concealment, negligence, and negligent misrepresentation.

PaineWebber served an answer denying liability and filed a counterclaim for recovery of fees and costs on the theory that it was entitled to indemnification under the terms of the agreement between the parties. The district court granted judgment on the pleadings in favor of BankAtlantic as to the counterclaim. On November 13, 1989, after a five-week trial, the jury returned a verdict in favor of PaineWebber.

In February 1990, BankAtlantic appealed the final judgment in favor of PaineWebber; PaineWebber ap-

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[2] BankAtlantic abandoned its breach of contract claim at trial and the district court dismissed that claim with prejudice.

pealed from the final judgment against it on the counterclaim. Around this time, BankAtlantic filed a motion for a new trial based upon newly discovered evidence that one of the jurors had read a newspaper article about BankAtlantic during the trial. The district court requested that the appeals be stayed and ordered an evidentiary hearing on the matter, which included an in camera interview of the jurors. On April 16, 1990, BankAtlantic filed a supplemental motion for new trial claiming that two of the jurors failed to give correct responses on voir dire. The district court denied both motions. BankAtlantic appealed that order, which was consolidated with the two previous appeals.[3]

On October 11, 1990, PaineWebber filed a motion for sanctions and attorney's fees, arguing that BankAtlantic's suit was frivolous because it suffered no injury or loss and because BankAtlantic was fully aware of how interest rates fluctuate and mortgages function. The district court denied PaineWebber's motion and PaineWebber appealed.

B. DISCUSSION

1. *The Motion for Judgment Notwithstanding the Verdict or for a New Trial*

[1,2] A court reviewing an order denying a motion for entry of judgment notwithstanding the verdict applies the same standard used by a district court when consider-

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[3] PaineWebber's appeal from the district court's order granting BankAtlantic judgment on the pleadings on the counterclaim, Case No. 90-5142, has been consolidated with BankAtlantic's appeal from the jury's final judgment, Case No. 90-5162, and with BankAtlantic's appeal from the district court's denial of BankAtlantic's motion for a new trial, Case No. 90-5776.

ing motions for directed verdict or for j.n.o.v. The Eleventh Circuit has set forth the standard in detail:

> If the facts and inferences point so strongly and overwhelmingly in favor of one party that the court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fairminded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied and the case submitted to the jury. A mere scintilla of evidence is insufficient to present to the jury. The motions for directed verdict and judgment n.o.v. should not be decided by which side has the better of the case, nor should they be granted only when there is a complete absence of probative facts to support a jury verdict. There must be a conflict of substantial evidence to create a jury question.

Von Stein v. Brescher, 904 F.2d 572, 578 (11th Cir.1990) (quoting *Boeing Company v. Shipman*, 411 F.2d 365, 374-75 (5th Cir.1969) (en banc). A court determining whether the record contains substantial evidence supporting the jury verdict must view the evidence, and all logical inferences therefrom, in the light most favorable to the appellee. *Smith v. PAPP Clinic, P.A.*, 808 F.2d 1449, 1452 (11th Cir. 1987).

[3] BankAtlantic advances several grounds in support of its argument that the district court erred in denying its motion for judgment notwithstanding the verdict or for a new trial. First, PaineWebber had a fiduciary duty pursuant to the financial advisory agreement it entered with BankAtlantic. Second, despite the duty it owed to BankAtlantic, PaineWebber did not disclose the risks associated with interest rate swaps. Third,

PaineWebber failed to disclose either its relationship with Homestead—the counterparty to the swaps—Homestead's financial problems. Fourth, it was undisputed that BankAtlantic's loss occurred because of PaineWebber's concealment of the risks from BankAtlantic. In sum, BankAtlantic contends that the jury's verdict was contrary to the substantial evidence presented at trial regarding PaineWebber's breach of fiduciary duty, negligence and fraud.

Having reviewed the voluminous record in the appropriate light, we determine the record contains substantial evidence to support the jury's verdict. The evidence showed that BankAtlantic was aware of the risks associated with the interest rate swaps, such as rate fluctuations and prepayment of mortgages. Indeed, Donald Streeter, the president and chairman of BankAtlantic, testified that he and Gerald Roberts, BankAtlantic's senior vice-president, had discussed the interest rate swaps. In addition, the record shows that in January 1984 PaineWebber made a full presentation to BankAtlantic's board of directors, which included a discussion of the effect of rising and falling interest rates.

The record also contains substantial evidence that BankAtlantic knew of PaineWebber's relationship with Homestead. Mr. Streeter indicated that he was aware that PaineWebber had recently brokered a $125 million CD offering for Homestead and that he knew that it was common for a broker to match its customers in a transaction. There also was evidence to refute the claim that Homestead was not creditworthy and that PaineWebber should have advised BankAtlantic to obtain collateral from Homestead. Lawrence Weisberg, Homestead's chairman of the board, testified that Homestead had been in business for over a century and that it continued to be profitable throughout the 1980s. Jim Hunter, BankAtlan-

tic's chief investment officer, and Walid Chammah of PaineWebber, testified that it was BankAtlantic that refused to enter into a collateralized swap with Homestead. Mr. Streeter testified that no one at BankAtlantic felt the need for collateral.

Finding substantial evidence to support the jury's verdict, we conclude that the district court did not err in denying BankAtlantic's motion.

2. *The Motions for New Trial Based on Alleged Juror Misconduct*

After filing its appeal of the final judgment, BankAtlantic filed two additional motions for new trial based on newly discovered evidence relating to alleged juror misconduct. The first of these recited that jury foreman Anthony Lippert had read, in violation of an express court order, an article that containing extraneous information about BankAtlantic and its chairman, Alan Levan. The article included a discussion of Mr. Levan's income in the context of BankAtlantic's poor earnings. The article also contained information on BankAtlantic's litigation with a minority shareholder which had been excluded as evidence from trial.

The second motion was based on alleged false responses by two members of the jury panel. Specifically, BankAtlantic alleged that Anthony Lippert concealed that he was a real estate salesman employed by a law school classmate of one of PaineWebber's trial counsel, and that John Chanquet concealed that several criminal convictions and a civil judgment had been entered against him. As noted, the district court held an evidentiary hearing and thereafter denied both motions.

(a) Juror Exposure to Extrinsic Evidence

[4] A juror's consideration of extrinsic evidence requires a new trial "if the evidence poses a *reasonable possibility of prejudice* to the defendant." *United States v. Rowe*, 906 F.2d 654, 656 (11th Cir.1990) (quoting *United States v. Perkins*, 748 F.2d 1519, 1533 (11th Cir.1984)). The defendant must first establish prejudice by a preponderance of credible evidence. If and when a defendant makes this showing, the burden shifts to the plaintiff to prove that the juror's consideration of the extrinsic evidence was harmless. *Id.* at 657. The factual determination of whether consideration of extrinsic evidence caused the defendant prejudice is committed to the trial court's "large discretion." *Id.* (quoting *Marshall v. United States*, 360 U.S. 310, 312, 79 S.Ct. 1171, 1173, 3 L.Ed.2d 1250 (1959)).

This court previously considered a motion for a new trial based on a jury's exposure to a newspaper article in *United States v. Bolinger*, 837 F.2d 436 (11th Cir.), *cert. denied*, 486 U.S. 1009, 108 S.Ct. 1737, 100 L.Ed.2d 200 (1988). After the jury returned a verdict of guilty on drug possession and distribution charges, the defendants learned that one juror had read a newspaper article containing information that had been suppressed as evidence by the trial judge. *Id.* at 440. One juror overheard another's comments regarding the substance of the article, specifically that a raid on the defendant's home had uncovered several hundred thousand dollars in a mattress. The other jurors heard only references to the article itself. *Id.*

Despite the inflammatory nature of the information reported in the article, the Eleventh Circuit concluded that the evidence against the defendant was so overwhelming that the introduction of the extrinsic evidence could not have been prejudicial. *Id.* The court distin-

guished *United States vs. Williams*, 568 F.2d 464 (5th Cir. 1978), which involved several jurors' hearing a television news report that the defendant had been previously convicted of the same offenses. *Id.* at 470-71. The *Williams* court had found the news report so prejudicial that the jurors' statements that they could disregard the newscast were "insufficient to obviate the problems of fairness caused by the news report." *Id.* at 471. The *Bolinger* court explained the differences between the two cases as follows:

> Given the facts and circumstances of this case, juror Hunter's dissemination of information regarding money allegedly found under [the defendant's] mattress does not require a new trial. This information, although suppressed as evidence by the district court, is not nearly as inflammatory as the information involved in *Williams*. As such, its dissemination does not, as a matter of law, obviate the importance of the juror's testimony that the information had no effect on their verdict. The district court heard this testimony, and its evaluation of this testimony is entitled to great weight.

837 F.2d at 440 (citations omitted).

In light of this precedent, we conclude that the district court properly determined that the extrinsic evidence did not pose a "reasonable possibility of prejudice." *Rowe*, 906 F.2d at 656. As in *Bolinger*, only one juror read the newspaper article in question; none of the other jurors had any knowledge of the contents of the article. Also, the information regarding Mr. Levan's income and BankAtlantic's litigation with a minority shareholder was not nearly as inflammatory as the news report in *Williams* about the defendant's previous conviction on the same charges. The district court's determination that the evidence was not prejudicial is supported as well by its

finding that the facts reported in the article would have been merely cumulative of facts already in evidence[4]. Finally, the district court found credible the jurors' testimony that the information had no effect on their impartiality.

The trial evidence, along with the jurors' post-trial testimony, supports the district court's determination that BankAtlantic was not prejudiced. Accordingly, the district court did not abuse its "large discretion" in concluding that the juror's consideration of the extrinsic evidence did not taint the jury's deliberations and require a new trial. *Rowe*, 906 F.2d at 657.

(b) Non-Disclosure During Voir Dire

[5] The standard for determining when inaccurate juror responses necessitate a new trial was set forth in *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 556, 104 S.Ct. 845, 850, 78 L.Ed.2d 663 (1984): "To obtain a new trial . . . a party must first demonstrate that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause." The first prong of the *McDonough* test requires a determination of whether the juror's answers were honest, "that is, whether he was aware of the fact that his answers were false." *United States v. Perkins*, 748 F.2d 1519, 1531 (11th Cir.1984). The second prong, that a correct response would have provided a valid basis for a challenge for cause, requires a showing of actual bias. *Id.* at 1532; *see also United States v. Casamayor*, 837 F.2d 1509, 1515 (11th Cir.1988).

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[4] The district court noted that it had excluded the facts in the article relating to the shareholder suit because the information was irrelevant, not because it was prejudicial.

[6] In this case, the district court assumed that the jurors' answers were not honest for purposes of BankAtlantic's motion. We need not reach that question because the district court properly found that BankAtlantic failed to show that correct responses from Lippert or Chanquet would have provided a valid basis for a challenge for cause. As noted, in order to satisfy the second prong of the *McDonough* test, this circuit requires a showing of actual bias. *Perkins*, 748 F.2d at 1532 (citing *United States v. Tutt*, 704 F.2d 1567, 1569 (11th Cir.), *cert. denied*, 464 U.S. 855, 104 S.Ct. 174, 78 L.Ed.2d 156 (1983)). "Actual bias may be shown in two ways: 'by express admission or by proof of specific facts showing such a close connection to the circumstances at hand that bias must be presumed.'" *Id.* (*quoting United States v. Nell*, 526 F.2d 1223, 1229 (5th Cir.1976)). For example, in *Perkins*, the record contained numerous indications of the juror's bias, including his dishonesty, his concealment of the fact that he knew the defendant[5] and his past involvement in similar litigation. *Id.* at 1532-33.

In the instant case, there was no express admission of actual bias. In addition, jurors Lippert and Chanquet were not closely connected to the case or to either party. BankAtlantic makes much of juror Lippert's employment with a former classmate of one of Painewebber's attorneys, but provides no specific facts that would create a presumption of bias. Unlike the juror in *Perkins*, there is

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[5] In fact, the juror's conduct in *Perkins* went beyond mere nondisclosure:

> although [the juror] did not recall knowing [the defendant] or being on a committee with him during voir dire, he remembered this association during trial and jury deliberations, but then forgot about it again during the post-trial hearing until the testimony of his fellow jurors reminded him. We do not find this sequence credible.

748 F.2d at 1532.

no evidence that Lippert or Chanquet felt compelled to misrepresent themselves, that they knew either party, or that they were ever involved in similar litigation. Furthermore, as the Supreme Court stated in *McDonough*, "[t]he motives for concealing information may vary, but only those reasons that affect a juror's impartiality can be said to affect the fairness of a trial." 464 U.S. at 556, 104 S.Ct. at 850. As the district court noted, neither Lippert nor Chanquet had a motive to conceal information just to get on the jury and find against BankAtlantic. There was no indication that either juror could not be impartial. Because BankAtlantic has failed to show actual bias, the district court did not abuse its discretion in denying the motion for new trial.

3. *The Alleged Attack on Alan Levan as a Basis for a New Trial*

BankAtlantic asserts that it is entitled to a new trial because of the alleged attack on Alan Levan during PaineWebber's direct examination and during closing argument. Specifically, BankAtlantic argues that PaineWebber's counsel improperly accused Mr. Levan of not coming to the stand during BankAtlantic's case, of personally owning BankAtlantic and of being a corporate raider. BankAtlantic also argues that evidence of Levan's income should have been excluded because it was irrelevant and highly prejudicial in violation of Federal Rules of Evidence 402 and 403.

In response, PaineWebber contends that evidence of Mr. Levan's financial dealings with BankAtlantic was admissible not only to measure credibility and bias, but because it went directly to PaineWebber's defense that Mr. Levan and his colleagues consciously sold the mortgages to which the interest rate swaps were matched.

[7, 8] In reviewing evidentiary determinations, we will not disturb a district court's rulings absent a clear showing of an abuse of discretion. *Hessen v. Jaguar Cars, Inc.*, 915 F.2d 641, 645 (11th Cir.1990). The standard for determining whether a jury verdict should be set aside as a result of misconduct of counsel is whether the conduct was "such as to impair gravely the calm and dispassionate consideration of the case by the jury." *Allstate Insurance Co. v. James*, 845 F.2d 315, 318 (11th Cir.1988) (citation omitted). The trial judge is given broad discretion in controlling counsel's arguments. Absent an abuse of discretion, the decision of the trial court, "which has had the opportunity to hear the offensive remarks within the context of the argument and to view their effect on the jury, should not be disturbed." *Id.*

The cases cited by BankAtlantic in support of its argument, e.g., *Koufakis v. Carvel*, 425 F.2d 892 (2d Cir.1970), and *McWhorter v. City of Birmingham*, 906 F.2d 674 (11th Cir.1990), are distinguishable. In *Carvel*, the court ordered a new trial based on grossly improper and inflammatory references made by plaintiff's counsel that were "wholly unjustified by anything in the record." 425 F.2d at 901. Specifically, during the trial counsel likened the defendant to a Mafia don several times, characterized the defendant as vastly wealthy and the case as one of a "little" and virtuous man of modest resources against a powerful and unscrupulous man of untold wealth, and remarked frequently that the defendant had failed to testify. *Id.* at 902. "Moreover, . . . [counsel] continually referred to matters which were not in the record and which were not relevant." *Id.* at 901. *See also Gonzalez v. Volvo of America Corp.*, 734 F.2d 1221, 1225-26 (7th Cir.1984) (ordering new trial where counsel repeatedly referred to defendant's corporate size, portrayed it as preying on innocent consumers and referred to matters outside of the record solely to arouse jurors'

sympathy); *McWhorter v. City of Birmingham*, 906 F.2d 674, 676-77 (11th Cir.1990) (affirming district court's decision to grant new trial because counsel's closing argument focused on theory eliminated during pretrial conference and on evidence expressly excluded by trial judge).

[9] In contrast to *McWhorter*, PaineWebber did not introduce any evidence in violation of a ruling by the district court. Unlike the remarks in *Carvel* and *Gonzalez*, we cannot say that PaineWebber's references to Mr. Levan were either "wholly unjustified by anything in the record" or irrelevant. PaineWebber introduced evidence of Levan's compensation and referred to him as a "corporate raider." PaineWebber also claimed that Levan had "cooked the books" to hide BankAtlantic's losses from the interest rate swaps so that a $3 million dividend could be paid to him personally. While some of the arguments could be viewed as improper, they did not appear to be references to matters outside the record. Rather, PaineWebber's closing argument was based on evidence that was largely adduced from BankAtlantic's own witnesses.

Furthermore, the references to Mr. Levan's income and the $3 million dividend were relevant to support PaineWebber's contention that the payment of the high salaries and the dividend occurred at the same time that BankAtlantic claimed it had suffered staggering losses due to the interest rate swaps. The evidence of Mr. Levan's financial dealings with BankAtlantic also was relevant to PaineWebber's claim that Mr. Levan and his associates consciously sold the mortgages matched in the interest rate swaps.

The evidence was relevant not only to PaineWebber's defense, but also to show Mr. Levan's bias or interest in

the outcome of the case.[6] "The partiality of a witness is subject to exploration at trial, and is always relevant as discrediting the witness and affecting the weight of his testimony." *Davis v. Alaska*, 415 U.S. 308, 316, 94 S.Ct. 1105, 1110, 39 L.Ed.2d 347 (1974) (citations and quotations omitted). Given Mr. Levan's financial interests in BankAtlantic, he clearly had a stake in the outcome of the litigation.

Contrary to BankAtlantic's contention, the district court did not abuse its discretion in admitting the evidence elicited during Mr. Levan's direct examination or in allowing PaineWebber's counsel to make the references to Mr. Levan during closing argument.

4. *The Alleged Error in Excluding Impeachment Evidence of PaineWebber's Expert Witness Tanya Beder*

BankAtlantic seeks a new trial on the ground that Tanya Beder, PaineWebber's expert witness, gave opinion testimony at trial which directly conflicted with the opinion she gave at her deposition and with statements she

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[6] BankAtlantic claims that PaineWebber called Mr. Levan as a witness solely to inflame the jury with information about his income and the image of him as a "corporate raider," which is an abuse of Federal Rule of Evidence 607.

Rule 607 provides: "The credibility of a witness may be attacked by any party, including the party calling the witness." Fed.R.Evid. 607. However, under Rule 607 a witness may not be called to the stand solely for the purpose of impeaching him and thereby obtaining testimony that is otherwise inadmissible. *Balogh's of Coral Gables, Inc. v. Getz*, 798 F.2d 1356, 1358 n. 2 (11th Cir.1986); *See generally* Sheila A. Skojec, Annotation, *Propriety, under Federal Rule of Evidence 607, of Impeachment of Party's Own Witness*, 89 A.L.R.Fed. 13 (1988).

BankAtlantic's argument is without merit. As discussed above, the testimony PaineWebber elicited from Mr. Levan was not "otherwise inadmissible" because it was relevant to its defense.

made in an article she had written.[7] BankAtlantic argues that the district court erred in admitting Ms. Beder's opinion testimony and in refusing to admit a draft of the article into evidence.

(a) Admission of Expert Testimony

[10,11] The decision to admit or exclude expert testimony is a matter within the district court's discretion and will not be reversed unless it is "manifestly erroneous." *United States v. Cross*, 928 F.2d 1030, 1049 (11th Cir.1991); *Stancill v. McKenzie Tank Lines, Inc.*, 497 F.2d 529, 535 (5th Cir.1974). BankAtlantic offers no facts or authority to support its contention that the district court's decision to admit the testimony was manifestly erroneous. In addition, the cases BankAtlantic cites do not support its assertion that a new trial is required. For example, *Harre v. A.H. Robins Co.*, 750 F.2d 1501 (11th Cir.1985), involved a Rule 60(b)(3)[8] motion for a new trial based on the "intractable conflicts" between an expert witness' testimony at trial and his deposition testimony in a later case. *Id.* at 1504. In *Harre*, the witness testified at trial that he had conducted certain

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[7] BankAtlantic alleges that Ms. Beder testified in deposition that the first $35 million swap was hedged against a $35 million stand by commitment for mortgage-backed securities, while the second swap was hedged against $50 million of fixed rate mortgages. At trial, however, she testified that the $85 million of swaps were hedged against a pool of $160,000 million of mortgages with yields of 12% or more. In addition, BankAtlantic claims that Ms. Beder's testimony at trial that the swaps were safe and risk-free hedges conflicted with an article she had written about the high risks of hedging.

[8] Rule 60(b)(3) provides in pertinent part as follows:

> On motion upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons . . . (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party.

Fed.R.Civ.P. 60(b)(3).

experiments; however, during his deposition in a later case, he testified that he had done no experiments. *Id.* The appellants established that the witness had committed perjury and that this misconduct prevented them from fully and fairly presenting their case. *Id.* at 1505. Appellant's reliance on *Harre* is misplaced. The present record reflects no such "intractable conflicts." After having the opportunity to hear all the prior testimony, the court found no merit in BankAtlantic's objection that Ms. Beder's testimony had changed. In further contrast to *Harre,* BankAtlantic was able to use the deposition during cross examination and had a full and fair opportunity to establish any inconsistencies. Under the circumstances of this case, we cannot say that the district court's decision to admit Ms. Beder's expert testimony was "manifestly erroneous" or that a new trial is required.

(b) Exclusion of Article

[12-14] District judges have broad discretion with respect to the admissibility of evidence. *United States v. Roger,* 465 F.2d 996, 997 (5th Cir.), *cert. denied,* 409 U.S. 1047, 93 S.Ct. 517, 34 L.Ed.2d 498 (1972). When a witness admits making a prior inconsistent statement, extrinsic proof of the statement is excludable. *Id.; see also United States v. Greer,* 806 F.2d 556, 559 (5th Cir.1986) (holding taped statement in direct conflict with trial testimony excludable where on cross-examination witness admitted making statement); *United States v. Sisto,* 534 F.2d 616, 622 (5th Cir.1976) (holding that proof of prior inconsistent statement may be elicited by extrinsic evidence only if witness on cross examination denies making it). At trial, Ms. Beder admitted having made the statements in the article and explained that they were consistent with her testimony. Accordingly, the district court did not abuse its discretion in excluding the article.

5. *Florida's "Economic Loss Rule" Does not Bar BankAtlantic's Tort Claims*

[15] PaineWebber maintains that BankAtlantic's entire appeal is moot because every claim BankAtlantic pursued at trial was barred under Florida law, which holds that a party to a contract cannot raise tort claims to recover solely economic damages flowing from a breach of contract unless the tort is independent of the breach of contract. *See AFM Corp. v. Southern Bell Tel. & Tel. Co.*, 515 So.2d 180 (Fla.1987). This court adopted the *AFM* doctrine in *Interstate Securities Corp. v. Hayes Corp.*, 920 F.2d 769, 773 (11th Cir.1991),[9] making clear that there is no bar to tort claims for injury or loss "outside the scope of the contract between the parties." *Id.* at 775.

[16] BankAtlantic's position is that the two interest rate swaps were not encompassed in the contract that it entered into with PaineWebber. Until now, PaineWebber has argued that the interest rate swaps were outside of the contract. For example, in its memorandum in opposition to BankAtlantic's motion for j.n.o.v. or a new trial, PaineWebber stated the following:

> The evidence amply demonstrated that the swaps were agreed to, or entered into, independent of any alleged financial advisor agreement . . . [The evidence at trial established that the [financial advisor] agreement did not cover interest rate swaps . . . .

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[9] In *Interstate Securities*, a securities brokerage firm brought an action against its client and the client's guarantor to recover an amount owed following the liquidation of the account. In turn, the client and guarantor asserted a counterclaim for breach of fiduciary duty, among other claims, against the firm. Relying on *AFM*, the Court of Appeals held that the client and guarantor could not recover tort damages under Florida law for breach of fiduciary duty since that claim was dependent upon existence of contract. 920 F.2d at 776-77.

> Thus, even had the jury concluded that the swaps were entered into while the financial advisor agreement was effective, the evidence established that the agreement did not encompass the swaps.

PaineWebber cannot have it both ways. Because the interest rate swaps were outside the scope of the contract, *Interstate Securities* does not bar BankAtlantic's tort claims.

6. *The District Court Did Not Err in Granting Judgment on the Pleadings as to PaineWebber's Counterclaim*

PaineWebber contends that the district court erred in dismissing its counterclaim for attorney's fees pursuant to its indemnification agreement with BankAtlantic because the court misinterpreted the indemnity provision to apply only to third party claims.

[17, 18] Contract interpretation is a legal question subject to de novo review by this Court. *Gibbs v. Air Canada*, 810 F.2d 1529, 1532 (11th Cir.1987). Construction of an indemnity agreement generally is a question of law for the court applying generalized principles of contract construction. *Id.* at 1533. Accordingly, our task is to determine the parties' intent with regard to the scope of the indemnity agreement. *Id.* "In determining this intent, contract provisions should be given their natural and most commonly understood meaning in light of the subject matter and circumstances, and the language should be read in common with the other provisions of the contract." *Id.* (citations omitted).

[19] Citing this latter principle, PaineWebber claims that the pertinent language is contained in "three successive sentences" which should be read together. According to PaineWebber, the unambiguous language of the agreement provides that (1) BankAtlantic would

indemnify it for "any and all losses, claims, damages and liabilities"; (2) BankAtlantic agreed to "reimburse [PaineWebber] for any reasonable expenses incurred (including reasonable fees and disbursements of counsel) in connection with the defense of any formal or informal claim, action, investigation or other proceeding caused by or arising out of or in connection with [PaineWebber's] acting pursuant to [this agreement]"; and (3) the only circumstance in which BankAtlantic was not required to indemnify PaineWebber was for "losses, claims, damages or liabilities . . . which a court of competent jurisdiction shall have determined by a final judgment to have primarily resulted from the wilful misconduct or gross negligence on the part of [PaineWebber]." Agreement at 2. PaineWebber argues that the district court's construction of the indemnity provision as applying only to third party claims renders the "any and all" language meaningless and effectively rewrites the agreement. We disagree.

Based on our application of the above principles of contract construction, we find that the district court correctly interpreted the indemnity agreement as applying solely to third parties. Like PaineWebber, we apply the principle set forth in *Gibbs*, that "language should be read in common with the other provisions in the contract"; however, we reach a different result. In addition to the "three successive sentences" on which PaineWebber focuses, the indemnity agreement contains additional language which supports the district court's finding that agreement was not intended to release PaineWebber from claims by BankAtlantic, but rather to indemnify it against third party claims. The opening sentence states the following: "Since [PaineWebber] will be acting on behalf of [BankAtlantic], [BankAtlantic] agrees that it will hold harmless [PaineWebber], its officers, directors,

agents and affiliates. . . ." Agreement at 1. The agreement further provides as follows:

> Promptly after receipt [by PaineWebber] of notice of any complaint, the commencement of any action or proceeding or the actual receipt of written notice of any claim in connection with any matter related to [PaineWebber's] activities pursuant to the Engagement Letter, [PaineWebber] will notify [BankAtlantic] in writing of such complaint or the commencement of such action or proceeding or the actual receipt of written notice of any claim and if [BankAtlantic] so elects or is requested by [PaineWebber], [BankAtlantic] will assume the defense of such action. . . .

Agreement at 2.

The requirement of notice to BankAtlantic upon PaineWebber's receipt of a complaint or notice of any claim in connection with PaineWebber's activities clearly contemplates third party claims, not claims by BankAtlantic against PaineWebber. As the district court correctly noted, the plain language of the agreement indicates that the parties intended to indemnify PaineWebber solely against third party claims resulting from PaineWebber's agency relationship with BankAtlantic.

While we agree with the district court's interpretation of the indemnification agreement, ultimately PaineWebber's assertion of its right to expenses pursuant to that agreement must be rejected on other grounds. As discussed above, and as PaineWebber has contended throughout this litigation, the interest rate swaps were not within the scope of the financial advisor agreement. The indemnification agreement clearly states that the indemnification is for actions arising out of the financial

advisor agreement. Agreement at 2. Because the interest rate swaps were outside the scope of the underlying agreement, they are similarly outside the scope of the indemnification agreement. Consequently, the district court did not err in dismissing PaineWebber's counterclaim, even though it did so on other grounds.

7. *PaineWebber's Motion for Sanctions and Attorney's Fees*

[20] On October 11, 1990, almost a year after the Final Judgment on the jury verdict was entered, PaineWebber filed a motion for sanctions pursuant to Federal Rule of Civil Procedure 11[10] and Florida Statutes § 57.105.[11] The motion alleged that BankAtlantic and its counsel initiated the underlying action with the knowl-

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[10] Rule 11 provides in relevant part as follows:

> The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

Fed.R.Civ.P. 11.

[11] In pertinent part, Section 57.105, Florida Statutes, provides as follows:

> The Court shall award reasonable attorney's fees to be paid to the prevailing party in equal amounts by the losing party and the losing party's attorney in any civil action in which the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the complaint or defense of the losing party; provided, however, the losing party's attorney is not personally responsible if he has acted in good faith, based on the representations of his client.

Attorney's fees pursuant to Florida Statute § 57.105 may be awarded to the prevailing party in a suit brought in federal court. *Capital Factors, Inc. v. Heller Fin., Inc.*, 712 F.Supp. 908, 914 (S.D.Fla.1989).

edge that BankAtlantic had suffered no injury, loss or damages and that its claims were not well grounded in fact or warranted by existing law. The district court denied the motion in an order entered October 26, 1990.

PaineWebber argues that the court abused its discretion in denying the motion and that the order "is fatally defective because it lacks an adequate evaluation as to the reason for denying the Rule 11 sanctions."[12] Brief at 14. In response, BankAtlantic contends that the district court adequately explained its decision and that PaineWebber's motion was untimely.

The standard for reviewing the October 26, 1990 order is abuse of discretion. *Pelletier v. Zweifel,* 921 F.2d 1465, 1514 (11th Cir.1991). The requirement of an explanation for the decision is mandated when "the basis and justification for a Rule 11 decision is not readily discernible on the record . . . . " *Knight v. Sharif,* 875 F.2d 516, 519 (5th Cir.1989) (quoting *Thomas v. Capital Security Servs.,* 836 F.2d 866 (5th Cir.1988)).

PaineWebber has not argued specifically that the district court's order violated section 57.105. However, the language of section 57.105 appears to be more stringent than that of rule 11 in requiring "that there was a complete absence of a justiciable issue of law or fact raised by the complaint . . . of the losing party." Accordingly, rejection of a rule 11 sanction clearly subsumes a denial of a statutory award of attorney's fees to the prevailing party.

[12] The court stated that it was "intimately" familiar with the proceedings. In denying the motion for Rule 11 sanctions, the court further stated the following:

> We have carefully scrutinized the Motion for Sanctions Pursuant to Rule 11 and responses. As is normal, the work products from both parties is excellent. However, we believe the motion must be denied. The parties will recall that at the time the court denied the motion for directed verdict, it observed that the case presented a "classic jury question." We continue to abide by that position. Given that observation, we do not deem this case warrants Rule 11 sanctions.

Contrary to PaineWebber's assertion, the rationale for the district court's decision was readily discernible. At the time the motion was denied, the court had already considered and denied PaineWebber's motion for directed verdict at the close of BankAtlantic's case in chief and the renewal of such motion after the close of all the evidence. In addition to evidence adduced by both parties, the court had the benefit of all the post-trial memoranda in which the "no damage" argument was also raised. Implicit in the court's denial of the Rule 11 motion was its determination at the close of all the evidence that there was sufficient evidence for a jury to consider. This determination was the antithesis of the basis for a Rule 11 sanction. Consequently, the district court did not abuse its discretion in denying PaineWebber's motion for rule 11 sanctions. In light of the court's proper disposition of the motion, we decline to reach the timeliness issue.

CONCLUSION

As the learned trial judge so aptly states in his Omnibus Order of January 19, 1990, "this cause presented the classic dispute for trial by jury." There was substantial evidence from which the jury reasonably found for PaineWebber. BankAtlantic received a full and fair trial on the merits. We find no error in the trial court's evidentiary rulings. The Final Judgment on the jury verdict and the Judgment on the Counterclaim were properly entered. The district court did not abuse its "large discretion" in denying the motions for new trial based on jury misconduct nor did it abuse its discretion in denying the motion for sanctions. For these reasons, the rulings and judgments appealed from are

AFFIRMED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 87-6643-CIV-SCOTT

BANKATLANTIC, A Federal Savings Bank, f/k/a ATLANTIC FEDERAL SAVINGS AND LOAN ASSOCIATION OF FORT LAUDERDALE,

Plaintiff,

v.

BLYTH EASTMAN PAINE WEBBER, INCORPORATED, n/k/a PAINEWEBBER, INCORPORATED,

Defendant.

ORDER

The Court is "intimately" familiar with these proceedings. We have carefully scrutinized the Motion for Sanctions Pursuant to Rule 11 and responses. As is normal, the work products from both parties is excellent. However, we believe the motion must be denied. The parties will recall that at the time the Court denied the Motion for Directed Verdict, it observed that the case presented a "classic jury question". We continue to abide by that position. Given that observation, we do not deem this case warrants Rule 11 sanctions. Accordingly the motion is denied.

DONE and ORDERED in Chambers, at Miami, Florida, this 26th day of October, 1990.

THOMAS E. SCOTT
UNITED STATES
DISTRICT JUDGE

Copies mailed to:

Eugene E. Stearns, Esquire
John H. Schulte, Esquire
William C. Hearon, Esquire

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 87-6643-CIV-SCOTT

BANKATLANTIC, etc.,

Plaintiff,

v.

BLYTH EASTMAN PAINE WEBBER, INC., etc.,

Defendant.

FINAL JUDGMENT

Based on this Court's Order of October 10, 1989, it is hereby ORDERED that final judgment shall be entered in favor of Plaintiff BankAtlantic and against Defendant on Defendant's counterclaim. The Court retains jurisdiction to assess costs and fees, to enforce the July 10, 1989 Order and to enter all other appropriate orders.

DONE and ORDERED in Chambers, at Miami, Florida this 26th day of January, 1990.

THOMAS E. SCOTT
UNITED STATES
DISTRICT JUDGE

Copies mailed to:

Eugene Stearns, Esq.
John Schulte, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 87-6643-CIV-SCOTT

BANKATLANTIC, f/k/a
ATLANTIC FEDERAL SAVINGS AND LOAN
ASSOCIATION OF FORT LAUDERDALE,

Plaintiff,

v.

BLYTH EASTMAN PAINE WEBBER, INC., n/k/a
PAINEWEBBER, INC.,

Defendant.

OMNIBUS ORDER

This cause is before the Court for resolution of post-trial motions and enforcement of the July 10, 1989 Order. Upon consideration of the arguments of counsel, we now enter the following order.

1. POST-TRIAL MOTIONS

A. Motion for JNOV or New Trial

Plaintiff has filed a Motion for Judgment Notwithstanding the Verdict, or Alternatively, for New Trial. The Court has reviewed Plaintiff's eighty-five (85) page memorandum of law with exhibits, asserting a myriad of errors. We have also considered Defendant's response and the full record of trial and pretrial proceedings.

Plaintiff urges the Court to scrutinize the verdict as the suspect resolution of a complex case. From that

perspective, Plaintiff argues that the verdict is not supported by the greater weight of the evidence. We disagree on both points. While some of the evidence was complex, the ultimate issues were not. Indeed, this cause presented the classic dispute for trial by jury. The parties introduced substantial evidence from which the jury reasonably found for Defendant. It is not for the Court to second-guess the jury's resolution of factual issues.[1]

As further grounds for relief, Plaintiff challenges certain evidentiary rulings by the Court. During the trial, in the exercise of our discretion, we afforded both parties great latitude in submitting evidence for consideration by the jury. These evidentiary issues were, for the most part, fully briefed and argued at the time of trial. Thus, we have already responded to Plaintiff's arguments, explaining our rulings in great detail, in open court and by written order. *See, e.g.*, Order of October 27, 1989 (evidence of financial interest); Trial Transcript filed November 14, 1989. Plaintiff received a full and fair trial on the merits. Even in retrospect, with the benefit of hindsight, we perceive no error.[2]

Finally, Plaintiff complains that the Court should have instructed the jury about Defendant's discovery misconduct and permitted Plaintiff to introduce evidence on this issue. The Court is somewhat surprised by Plaintiff's position. At trial, the Court decided that it would not be necessary to instruct the jury about Defendant's discovery abuses because the prejudice to Plaintiff had been "amply cured" through the expedited discovery we ordered on July 10, 1989. In any event, it was certainly

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[1] For the same reasons, any question of perjury was for the jury to resolve in determining the credibility of the witnesses.

[2] Similarly, we stand by our original rulings concerning the jury instructions.

within our discretion to determine that the panoply of sanctions otherwise imposed would suffice to achieve the desired result. *See* Order of October 20, 1989.

Finding no merit to these or Plaintiff's remaining assertions of error,[3] the Motion for Judgment Notwithstanding the Verdict, or Alternatively, for New Trial, is hereby DENIED.

B. Defendant's Motion for Reconsideration

Defendant's Motion for Reconsideration of Judgment on the Pleadings on Counterclaim and for Reinstatement of Counterclaim, is hereby DENIED. *See* Order of October 10, 1989.

II. SANCTIONS

This cause is now in the appropriate juxtaposition for enforcement of the July 10, 1989 order. Defendant's victory on the merits of this action does not affect our intent to enforce the July 10 order. The Court considered the possibility of Plaintiff's defeat at trial. *See* Memorandum Order, July 10, 1989, at page 31, para. 9 ("*Should* Plaintiff ultimately prevail on the merits of this action ....") (emphasis added). While we applaud the professional conduct of trial counsel, the discovery abuses of prior counsel and Defendant cannot be excused. Enforcement of the sanctions order is necessary to serve the punishment and deterrence goals of the rule and to vindicate the integrity of the Court and discovery process.

The Court has reviewed counsel's supplementary memoranda discussing the impact, if any, of *Pavelic and LeFlore v. Marvel Entertainment Group,* 110 S. Ct. 456

[3] In particular, we disagree with Plaintiff's characterization of Defendant's closing argument and therefore reject this argument as grounds for post-trial relief.

(1989), on the July 10 order. *Pavelic* was grounded in a strict construction of Rule 11. The July 10 order was based on Rule 37(b)(2) and the inherent sanctions power of federal courts, *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980). Rule 37 is more comprehensive than Rule 11, and the inherent sanctions power is necessarily broad. Accordingly, *Pavelic* does not alter our decision.

Defendant argues that the inherent sanctions power of federal courts does not apply in diversity cases. That argument is contrary to Supreme Court and Eleventh Circuit authority, however. In *Link v. Wabash Railroad Co.*, 370 U.S. 626, 632 (1962), the Supreme Court upheld an order of dismissal for failure to prosecute, on the basis of the "well-acknowledged inherent power of a court to levy sanctions in response to abusive litigation practices." *Link* was a diversity case. Nearly twenty years later, in *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764-65 (1980), the Supreme Court cited *Link* as support in holding that federal courts possess inherent sanctions power.

Similarly, in *Carlucci v. Piper Aircraft Corp.*, 775 F.2d 1440 (11th Cir. 1985), a diversity action, the district court imposed sanctions pursuant to Rule 37, 28 U.S.C. § 1927, and its inherent sanctions power. The Eleventh Circuit affirmed, finding that "*all* of these bases, relied upon by the court below, support its assertion of power to impose sanctions for bad faith conduct during discovery." *Id.* at 1447.

To the extent that *Carlucci* conflicts with *Amey, Inc. v. Gulf Abstract & Title, Inc.*, 758 F.2d 1486, 1508 (11th Cir. 1985), *Carlucci* is the better rule. The inherent powers of federal courts are not derived from state law and therefore should not vary with the law of the forum state.

Accordingly, finding no reason to depart from the July 10, 1989 Order, it is hereby ORDERED as follows:

1. Ruden, Barnett's Motion to Amend Final Judgment is DENIED.

2. This cause is REFERRED to United States Magistrate Ted Bandstra for the issuance of a Report and Recommendation on the amount of costs and fees awardable to Plaintiff from Ruden, Barnett et al. and Defendant as a result of the July 10, 1989 Order.

3. Defendant's Motion to Tax Costs is DEFERRED pending review of the pleadings and documentation submitted. Ultimately, the Court will set-off the amount of costs due Defendant from the amount of costs and fees due Plaintiff as a result of the July 10, 1989 Order.

DONE and ORDERED in Chambers, at Miami, Florida this 19th day of January, 1990.

THOMAS E. SCOTT
UNITED STATES
DISTRICT JUDGE

Copies mailed to:

Eugene Stearns, Esq.
John Schulte, Esq.
Bennett Falk, Esq.
Magistrate Bandstra

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 87-6643-CIV-SCOTT

BANKATLANTIC, f/k/a ATLANTIC FEDERAL SAVINGS AND LOAN ASSOCIATION OF FORT LAUDERDALE,

Plaintiff,

v.

BLYTH EASTMAN PAINE WEBBER, INC., n/k/a PAINEWEBBER, INC.,

Defendant.

SPECIAL VERDICT

I. CLAIMS

1. BREACH OF FIDUCIARY DUTY

Did PaineWebber breach a fiduciary duty or duties owed to BankAtlantic which thereby caused BankAtlantic's loss or damage?

(a) As to the first swap?

YES ____ NO ✔

(b) As to the second swap?

YES ____ NO ✔

Please go on to question 2.

2. FRAUDULENT MISREPRESENTATION

Did PaineWebber make a misrepresentation of material existing fact, which PaineWebber knew to be false, which it intended to induce BankAtlantic to rely upon, which BankAtlantic justifiably relied and acted upon, and which thereby caused BankAtlantic damage?

(a) As to the first swap?

YES ___ NO ✔

(b) As to the second swap?

YES ___ NO ✔

Please go on to question 3.

3. NEGLIGENT MISREPRESENTATION

Did PaineWebber make a misrepresentation of a material existing fact, which it should have known to be false, or which it made without knowledge of its truth or falsity, which it intended to induce BankAtlantic to rely upon, and which BankAtlantic justifiably relied and acted upon, and which thereby caused BankAtlantic damage?

(a) As to the first swap?

YES ___ NO ✔

(b) As to the second swap?

YES ___ NO ✔

Please go on to question 4.

4. FRAUDULENT CONCEALMENT

Did PaineWebber intentionally conceal from BankAtlantic a material fact, which PaineWebber knew or should have known to be material, which was unknown to BankAtlantic, and which if known to BankAtlantic would have kept BankAtlantic from entering into the

interest rate swaps, and which thereby caused BankAtlantic damage?

(a) As to the first swap?

YES ____ NO ✔

(b) As to the second swap?

YES ____ NO ✔

Please go on to question 5.

5. NEGLIGENCE

(a) Did PaineWebber fail to use reasonable care with regard to the interest rate swaps entered into by BankAtlantic, which was a legal cause of BankAtlantic's loss or damage?

(i) As to the first swap?

YES ____ NO ✔

(ii) As to the second swap?

YES ____ NO ✔

If you answered "yes" as to one or both swaps in question 5(a), please answer question 5(b). If you answered "no" as to both swaps in question 5(a), please proceed to Section II, Affirmative Defenses.

(b) Did BankAtlantic fail to use reasonable care with regard to the interest rate swaps which thereby caused BankAtlantic's loss or damage?

(i) As to the first swap?

YES ____ NO ____

(ii) As to the second swap?

YES ____ NO ____

If you answered "yes" as to one or both swaps in question 5(b), please answer question 5(c). Otherwise, proceed to Section II, Affirmative Defenses.

(c) What percentage of the total negligence is chargeable to each party?

(i) As to the first swap? (Only answer this question if you answered "yes" to question 5(b)(i)).

PaineWebber ____% BankAtlantic ____%

(NOTE: the total combined percentage must equal 100%)

(ii) As to the second swap? (Only answer this question if you answered "yes" to question 5(b)(ii)).

PaineWebber ____% BankAtlantic ____%

(NOTE: the total combined percentage must equal 100%)

Please go on to Section II, Affirmative Defenses.

II. AFFIRMATIVE DEFENSES

If you have answered "yes" as to one or both swaps in questions 1, 2, 3, 4 or 5(a), please answer questions 6 and 7. Otherwise, the foreperson should now sign and date the verdict form.

(6) RATIFICATION

Did BankAtlantic ratify PaineWebber's conduct as to:

(i) the first swap? YES ____ NO ____

(ii) the second swap? YES ____ NO ____

Please go on to question 7.

(7) WAIVER

Did BankAtlantic knowingly relinquish, or waive, its right to hold PaineWebber responsible for any loss in connection with:

(i) the first swap? YES ____ NO ____

(ii) the second swap? YES ____ NO ____

Please go on to Section III, Damages.

III. DAMAGES

If you have answered "yes" as to one or both swaps in questions 1, 2, 3, 4 or 5(a), *and* you have further answered "no" to questions 6 and 7, go on to question 8. Otherwise, the foreperson should now sign and date the verdict form.

(8) MITIGATION OF DAMAGES

Did BankAtlantic fail to mitigate its damages with respect to:

(i) the first swap? YES ____ NO ____

(ii) the second swap? YES ____ NO ____

Please go on to question 9.

(9) COMPENSATORY DAMAGES

What amount of money will fairly and adequately compensate BankAtlantic for the loss or damage that it has suffered? (If you have answered "yes" as to one or both swaps in question 8, you should reduce the amount of compensatory damages by the amount that BankAtlantic

could have reasonably realized had it mitigated its damages):

(i) As to the first swap? $_____

(ii) As to the second swap? $_____

In determining the total amount of damages, do not make any reduction because of the negligence, if any, of BankAtlantic. If you have found BankAtlantic negligent in any degree, the Court, if necessary, will reduce the total amount of damages by the amount you found chargeable to BankAtlantic.

If you have awarded any money to BankAtlantic under question 9, go on to question 10. If you have awarded no money to BankAtlantic under question 9, the foreperson should now sign and date the verdict form.

(10) PUNITIVE DAMAGES

(a) Do you find, in your discretion, that punitive damages should be awarded against PaineWebber?

YES ___ NO ✔

If you have answered "yes," to question 10(a), go on to question 10(b). If you have answered "no" to question 10(b), the foreperson should now sign and date the verdict form.

(b) How much do you assess as punitive damages against PaineWebber? $ 0

SO SAY WE ALL, this 14th day of November, 1989.

_____

FOREPERSON

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 87-6643-CIV-SCOTT

BANKATLANTIC, f/k/a
ATLANTIC FEDERAL SAVINGS AND LOAN
ASSOCIATION OF FORT LAUDERDALE,

Plaintiff,

v.

BLYTH EASTMAN PAINE WEBBER, INC.,
n/k/a PAINEWEBBER, INC.,

Defendant.

MEMORANDUM DECISION

This cause is before the Court upon Defendant PaineWebber, Inc.'s Motion for Directed Verdict. The Court has considered Defendant's written submission and the arguments of both counsel in open court. We are now prepared to rule on the motion.

On a motion for directed verdict, the Court must consider all of the evidence in the light most favorable to the non-moving party. The motion should be granted only if no reasonable jury could find for the non-movant. *Dancey Co. v. Borg-Warner Corp.*, 799 F.2d 717 (11th Cir. 1986).

Many of the arguments raised by Defendant at this stage would require the Court to resolve conflicts in the evidence, and for that reason should more properly be put to the jury. For example, the question of whether Plaintiff has proven an independent tort raises numerous fact issues as to each element of the torts alleged. Plaintiff has introduced sufficient evidence from which the jury could

find an independent tort. Under these circumstances, the Court has no power or inclination to take this case from the jury on this point.[1]

Defendant further alleges that Plaintiff has failed to prove its case on the breach of fiduciary relationship claim, because the transactions at issue were allegedly consummated outside the temporal scope of the engagement letter. This argument, however, misapprehends the nature of fiduciary duty law. A fiduciary relationship is not necessarily bounded by a contract. On the contrary, "a fiduciary relationship may exist under a variety of circumstances, including cases where there has been a special confidence reposed in one, who in equity and good conscience is bound to act in good faith and due regard to the interests of the one reposing the confidence." *Riggs National Bank v. Freeman,* 682 F. Supp. 519, 520 (S.D. Fla. 1988) (Hoeveler, J.). Given this broad definition, and in light of the evidence presented, a directed verdict would be improper on this basis.

Finally, the Court has given special consideration to Plaintiff's argument on loss causation which, in our view, is Plaintiff's strongest argument. We have reviewed the relevant case law in an effort to resolve this issue. Most of the cases speak in terms of abstract principles without grounding them in the facts. However, in the final analysis, the Court is persuaded by the most recent pronouncement of the Eleventh Circuit, as cited by Plaintiff in opposition to the motion. In *Bruschi v. Brown,* 876 F.2d 1526, 1531 (11th Cir. 1989), the court found that the loss causation element was met in a "situation in which a defendant induces a plaintiff to enter into a risky transac-

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[1] For the same reason, the Court will not direct a verdict on the grounds of failure to mitigate or prove damages. Sufficient evidence exists for a jury determination on these questions.

tion by misrepresenting it as safe and the plaintiff suffers a loss resulting from the risky nature of the investment."

The Court finds that *Bruschi* is controlling here. Plaintiff has offered evidence of several misrepresentations sufficient to raise a jury question on loss causation. In particular, we note that a reasonable jury could find that the alleged misrepresentations as to the beneficial effects of interest rate swaps on interest rate risk "touches upon" the losses incurred by Plaintiff due to falling interest rates. *Huddleston v. Herman & McLean*, 640 F.2d 534, 539 (5th Cir. Mar. 1981). Finding that the nexus of loss causation has been sufficiently established, the motion must be denied on that basis as well.

Accordingly, for all of these reasons, the Motion for Directed Verdict is hereby DENIED and Defendant shall attempt to rebut Plaintiff's case by way of evidence and closing argument to the jury.[2] As Plaintiff has abandoned its breach of contract claim, that count is hereby DISMISSED with prejudice.

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[2] In view of this ruling, punitive damages have become relevant as to the independent torts involving intentional wrongdoing. Accordingly, Defendant shall forthwith produce evidence of financial worth to Plaintiff, consistent with our prior orders. The Court will instruct the jury on punitive damages, and the parties may argue the issue accordingly.

DONE and ORDERED in Chambers at Miami, Florida on this 31st day of October, 1989.

THOMAS E. SCOTT
UNITED STATES
DISTRICT JUDGE

Copies to:

Eugene Stearns, Esq,
John Schulte, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 87-6643-CIV-SCOTT

BANKATLANTIC, f/k/a
ATLANTIC FEDERAL SAVINGS AND LOAN
ASSOCIATION OF FORT LAUDERDALE,

Plaintiff,

v.

BLYTH EASTMAN PAINE WEBBER, INC.,
n/k/a PAINEWEBBER, INC.,

Defendant.

OMNIBUS ORDER

This cause is before the Court on various pending motions of both parties. Upon consideration, it is hereby ORDERED as follows:

1. Based upon an independent review of the file and relevant documents, the Report and Recommendation of the Special Master is hereby APPROVED and ADOPTED as an Order of the Court, and all objections are OVERRULED. By way of clarification, it is hereby ORDERED that should Plaintiff introduce sufficient evidence to submit the question of punitive damages to the jury, Defendant shall be prepared to provide Plaintiff with documents evidencing Defendant's financial worth. The terms of the Report and Recommendation are further clarified and supplemented by the terms of this Order.

2. Plaintiff's Motion in Limine to prevent introduction of evidence of Alan Levan's corporate or

financial interest in BankAtlantic is DENIED at this time. The evidence is relevant for impeachment purposes. Plaintiff may renew the objection at trial if the evidence is not offered to impeach and is not otherwise relevant as offered.

3. Defendant's Motion for Continuance is DENIED. Defendant has failed to provide sufficient cause for any further delay of trial.

4. Plaintiff filed a Motion for Judgment on the Pleadings as to Defendant's Counterclaim and 11th and 12th Affirmative Defenses two business days before trial. Because the motion was not at issue, initially the Court was inclined to deny Plaintiff's motion without prejudice to renew as a motion for directed verdict at the appropriate time. However, one calendar day before trial, Defendant has responded to the motion by way of a motion for judgment on the pleadings on the counterclaim, and for summary judgment on Counts V (negligent misrepresentation) and VI (negligence) of the Amended Complaint.

The Court has reviewed the arguments of counsel and finds no reason for further delay on the question of law presented. "Under Florida law, construction of a contract of indemnity generally is a question of law for the court applying recognized rules of contract interpretation." *Gibbs v. Air Canada*, 810 F.2d 1529, 1533 (11th Cir. 1987). The Court's role is to determine the intent of the parties by giving the terms of the agreement "their natural and most commonly understood meaning in light of the subject matter and circumstances." *Id.*

The ordinary purpose of an indemnification agreement between two parties is to shift liability for

claims asserted by third parties. Defendant contends, however, that Plaintiff has agreed to indemnify Defendant against claims held by Plaintiff against Defendant. In essence, then, Defendant has read the indemnification agreement as a *release* of claims that Plaintiff might otherwise assert against Defendant.

The indemnity provision does not support Defendant's position because the provision does not speak in terms of a release of liability. The lead sentence of the indemnity provision states, "Since BEPW will be acting on behalf of the Association [BankAtlantic], the Association agrees that it will indemnify and hold harmless BEPW . . . ." Similarly, the indemnity provision requires Defendant to give notice to Plaintiff of receipt of claims covered by the agreement. Plainly, the parties intended to shift liability from Defendant to Plaintiff for certain third party claims resulting from Defendant's agency relationship with Plaintiff.

Accordingly, Plaintiff's Motion for Judgment on the Pleadings as to Defendant's Counterclaim and 11th and 12th Affirmative Defenses is hereby GRANTED, and Defendant's Motion for Judgment on the Pleadings on its Counterclaim, and for Summary Judgment on Counts V and VI of the Amended Complaint is hereby DENIED. Accordingly, CounterPlaintiff PaineWebber, Inc.'s Motion to Defer Attorneys' Fees Until After Trial is DENIED as moot, in light of our ruling in paragraph three of this Order.

5. Plaintiff's Renewed Motion to Strike Defendant's Pleadings, or Alternatively, to Amend the Court's Memorandum Order of July 10, 1989, is DENIED, in view of the facts provided in Defen-

dant's response. The time has come for Plaintiff and Defendant to put their claims to the test of the factfinder.

6. The Joint Motion for In Camera Review is GRANTED. The Court will conduct a hearing on the motion on Wednesday, October 11, 1989 at 9:30 a.m.

7. The Application for Limited Appearance by Rolling Chippey is GRANTED.

8. As the parties have been telephonically notified, Plaintiff's Motion for Extension of Time to File Amended Pretrial Stipulation and Defendant's Motion for Pretrial Conference are GRANTED to the following extent: (a) the parties shall file an amended pretrial stipulation by 5:00 p.m. on October 9, 1989 with a courtesy copy in Chambers; (b) the parties shall meet with a court reporter present and attempt to resolve all matters pertaining to pretrial conference without the aid of the Court. Any remaining matters should be submitted to the Court, with a transcript of proceedings, by 5:00 p.m. on October 9, 1989. The Court will review the transcript and resolve any outstanding matters on the morning of trial.

9. As the parties have been telephonically notified, counsel shall submit proposed voir dire questions by 5:00 p.m. on October 9, 1989. Counsel shall submit proposed jury instructions and interrogatory verdict forms on October 12, 1989.

10. Defendant's Motion to Stay Action Pending Arbitration is DENIED. This issue should have been raised at the pleading stage, not on the eve of trial. Accordingly, any right to arbitration has been waived. Moreover, arbitration would merely avoid the terms of the July 10, 1989 Order.

11. Defendant's Motion for Summary Judgment on Counts I-VI is DENIED. Plaintiff need not rely solely on contractual remedies as Plaintiff has adequately alleged an independent tort. *See AFM Corporation v. Southern Bell Telephone and Telegraph Co.*, 515 So. 2d 180 (Fla. 1987); *Lewis v. Guthartz*, 428 So. 2d 222 (Fla. 1982); *American International Land Corp. v. Hanna*, 323 So. 2d 567 (Fla. 1975); *John Brown Automation, Inc. v. Nobles*, 537 So. 2d 614 (Fla. 2d DCA 1988); *Hooper v. Barnett Bank of West Florida*, 474 So. 2d 1253 (Fla. 1st DCA 1985).

12. Defendant's Motion in Limine to Exclude Evidence of Discovery Disputes is GRANTED. Counsel shall not make any reference to discovery matters at trial and shall not attempt to introduce any evidence of discovery disputes. However, the Court DEFERS the issue of instructing the jury pursuant to paragraph eleven of the Memorandum Order of July 10, 1989.

13. Defendant's Motion in Limine to Exclude Evidence Varying the Terms of the Engagement Letter is DENIED.

14. Plaintiff's Motion to Strike Witnesses and Exhibits is DENIED. Plaintiff has been permitted further discovery pursuant to the Memorandum Order of July 10, 1989 and therefore has suffered no cognizable prejudice on this motion.

15. Defendant's Motion in Limine Regarding the Measure of Damages is DEFERRED until the appropriate moment at trial.

DONE and ORDERED in Chambers at Miami, Florida on this 10th day of October, 1989.

THOMAS E. SCOTT
UNITED STATES
DISTRICT JUDGE

Copies to:

Eugene Stearns, Esq.
John Schulte, Esq.
Michael Nachwalter, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 87-6643-CIV-SCOTT

BANKATLANTIC, a federal savings bank, f/k/a ATLANTIC FEDERAL SAVINGS AND LOAN ASSOCIATION OF FORT LAUDERDALE,

Plaintiff,

vs.

BLYTHE EASTMAN PAINE WEBBER INCORPORATED, n/k/a PAINEWEBBER INCORPORATED,

Defendant.

AMENDED AFFIRMATIVE DEFENSES TO AMENDED COMPLAINT

Defendant Blythe Eastman Paine Webber Inc., n/k/a PaineWebber, Inc. ("PaineWebber"), by and through its undersigned counsel, submits the following amended affirmative defenses to plaintiff BankAtlantic's amended complaint.

FIRST AFFIRMATIVE DEFENSE

84. Each count asserted by plaintiff fails to state a claim for which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

85. Plaintiff, at the time of the transactions complained of, was sophisticated with respect to interest rate

risks and their management. Plaintiff considered, or should have considered, alternative financial vehicles to manage its interest rate spreads, including collateral mortgage obligation (CMO) financing, asset sales, equity reappraisals, and regulatory accounting. Before and during the interest rate swaps complained of, plaintiff was in communication with brokerage firms, investment banks, and other institutions which presented various products and alternatives for plaintiff's consideration to manage interest rate risks. Plaintiff thus had full, complete, and contemporaneous knowledge of the terms of, and risks inherent in, the interest rate swaps and other transactions complained of, and approved, authorized, and ratified the transactions complained of, and is accordingly precluded from recovery.

THIRD AFFIRMATIVE DEFENSE

86. Plaintiff's recovery, if any, should be barred wholly or in part as a result of plaintiff's comparative negligence in connection with the transactions complained of.

FOURTH AFFIRMATIVE DEFENSE

87. Plaintiff's damages, if any, should be reduced as a result of plaintiff's failure to mitigate damages.

FIFTH AFFIRMATIVE DEFENSE

88. Plaintiff voluntarily assumed all risks attendant to the interest rate swaps and transactions complained of and therefore is precluded from recovery.

SIXTH AFFIRMATIVE DEFENSE

89. Plaintiff had full, complete, and contemporaneous knowledge of the terms of, and risks inherent in, the interest rate swaps and other transactions complained of, and nonetheless approved and authorized the transactions, and continued to act under the agreements allegedly entered into. Plaintiff is therefore barred from asserting its claim under the doctrine of waiver and estoppel.

SEVENTH AFFIRMATIVE DEFENSE

90. Plaintiff's alleged damages are not recoverable on the grounds that they were not within the contemplation of the parties, nor were they foreseeable.

EIGHTH AFFIRMATIVE DEFENSE

91. Assuming that the alleged misstatements or omissions alleged in the amended complaint were made, which is denied, such statements or omissions related to matters of opinion and expectations of future occurrences and are therefore not actionable.

NINTH AFFIRMATIVE DEFENSE

92. Assuming that plaintiff suffered any damages, which is denied, such damages were caused or contributed to by persons, market conditions, or events beyond the control of defendant, and defendant is not liable therefor.

TENTH AFFIRMATIVE DEFENSE

93. Plaintiff lacks standing to maintain this action.

ELEVENTH AFFIRMATIVE DEFENSE

94. Plaintiff is contractually precluded from recovering any damages from defendant in this action by virtue of the parties' March 20, 1984 indemnity and damage limitation agreement, which is attached as Exhibit "A" and is incorporated by reference herein. This agreement either bars any recovery by plaintiff, or alternatively, establishes plaintiff's indemnity and reimbursement obligation to defendant, which obligation constitutes a complete set-off to any recovery by plaintiff.

TWELFTH AFFIRMATIVE DEFENSE

95. Plaintiff's recovery, if any, is contractually limited to the amount of fees actually received by defendant pursuant to the engagement letter, unless defendant is liable for gross negligence or intentional misconduct. A copy of the indemnity and damage limitation agreement is attached as Exhibit "A" and is incorporated by reference herein.

WHEREFORE, defendant PaineWebber demands judgment in its favor, and such other and further relief as the Court deems just and equitable, including costs and attorneys' fees.

TEW JORDEN SCHULTE & BEASLEY
Counsel for PaineWebber Incorporated
701 Brickell Avenue
Miami, Florida 33131
Telephone: (305) 371-2600

By _____
John H. Schulte

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing amended answer and affirmative defenses to amended complaint was hand-delivered this 1st day of September, 1989, upon Eugene Stearns, Esq., Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A., 2200 Museum Tower, 150 West Flagler Street, Miami, Florida 33130.

John H. Schulte

EXHIBIT "A"

Atlantic Federal Savings and Loan
Association of Fort Myers
1750 East Sunrise Boulevard
Fort Lauderdale, Florida 33304

March 20, 1984

Blyth Eastman Paine Webber Incorporated
1221 Avenue of the Americas
New York, New York 10020

Dear Sirs:

This letter will confirm certain arrangements that we have agreed upon in connection with Atlantic Federal Savings and Loan Association of Fort Lauderdale (the "Association") retaining Blyth Eastman Paine Webber Incorporated ("BEPW") to represent the Association exclusively as financial advisor pursuant to the engagement letter dated today's date between BEPW and the Association (the "Engagement Letter").

In connection with BEPW's services, the Association will furnish or cause to be furnished to BEPW such information and data (hereinafter referred to as the "Information") relating to the Association as BEPW reasonably requests. The Association also will use its best efforts to provide BEPW with reasonable access to the Association's officers, directors, employees and independent accountants. BEPW agrees that the Information, whether oral or written, will be kept confidential by BEPW and by its officers, employees and agents, will be disclosed by BEPW only to such officers, employees and agents of BEPW and its affiliates as need to know the Information in connection with the performance of BEPW's services under the Engagement Letter, and will be used only for purposes of such engagement; and

BEPW agrees that the provisions of this sentence shall survive any termination of BEPW's engagement under the Engagement Letter. The Association recognizes and confirms that in BEPW's performance of its services under the Engagement Letter (a) BEPW may rely upon the Information without independent verification, (b) BEPW does not assume responsibility for the accuracy or completeness thereof whether or not it makes an independent verification, and (c) BEPW will not make nor cause to have made an independent appraisal of the assets of the Association except to the extent provided in the Engagement Letter.

Since BEPW will be acting on behalf of the Association, the Association agrees that it will indemnify and hold harmless BEPW, its officers, directors, agents, employees and affiliates and each person, if any, who controls BEPW within the meaning of Section 15 of the Securities Act of 1933 or Section 20(a) of the Securities Exchange Act of 1934 (BEPW and each such entity and person being hereinafter called an "Indemnified Party") from and against any and all losses, claims, damages and liabilities to which such Indemnified Party may become subject which are (A) related to or arising out of (i) actions taken or omitted to be taken (including any untrue statements made or any statements omitted to be made) by the Association or (ii) actions taken or omitted to be taken by an Indemnified Party with the Association's consent or in conformity with the instructions of, or actions taken or omitted to be taken by, the Association or (B) otherwise related to or arise out of BEPW's acting pursuant to the covenants contained in the section captioned "Financial Analysis of the Association" and "Advisory Issues/Stockholder Interests" in the Engagement Letter. The Association also agrees to reimburse each Indemnified Party for any reasonable expenses incurred (including reasonable fees and disbursements of counsel)

in connection with the investigation of or the preparation for or defense of any formal or informal claim, action, investigation or other proceeding caused by or arising out of or in connection with BEPW's acting pursuant to the Engagement Letter, whether or not BEPW is named party thereto and whether or not any liability results therefrom. The Association will not, however, be responsible for any losses, claims, damages or liabilities (i) for which indemnification is sought solely pursuant to clause (B) of the first sentence of this paragraph which a court of competent jurisdiction shall have determined by a final judgment to have primarily resulted from wilful misconduct or gross negligence on the part of the Indemnified Party seeking indemnification hereunder, or for expenses incurred by such Indemnified Party in connection with such losses, claims, damages or liabilities or (ii) arising out of any settlement by an Indemnified Party of any claim, action or proceeding entered into by or on behalf of such Indemnified Party without the Association's prior written consent.

Promptly after receipt by any Indemnified Party of notice of any complaint, the commencement of any action or proceeding or the actual receipt of written notice of any claim in connection with any matter related to BEPW's activities pursuant to the Engagement Letter, BEPW will notify the Association in writing of such complaint or of the commencement of such action or proceeding or the actual receipt of written notice of any claim and if the Association so elects or is requested by BEPW, the Association will assume the defense of such action, proceedings, or claim, including the employment of counsel reasonably satisfactory to BEPW and the payment of the fees and disbursements of such counsel, in which event the Association shall not be obligated to pay the fees and disbursements of separate counsel for BEPW in such action. In the event, however, that

BEPW's legal counsel shall reasonably determine that defenses may be available to an Indemnified Party that are different from or in addition to those available to the Association or that there is or could reasonably be expected to be a conflict of interest by reason of the Association and an Indemnified Party having common counsel in any action or proceeding, or if the Association has not assumed the defense of any action or proceeding, then BEPW may employ separate counsel to represent or defend it or any Indemnified Party in any such action or proceeding in which it or such Indemnified Party may become involved or is named as defendant and the Association shall pay the reasonable fees and disbursements of such separate counsel; *provided* that the Association shall not be obligated to pay the fees and disbursements of more than one such separate counsel for any one such action or proceeding in any one jurisdiction.

The Association and BEPW agree that if any indemnification or reimbursement sought by an Indemnified Party pursuant to this agreement is held by a court to be unavailable for any reason except, with respect to indemnification sought solely pursuant to clause (B) of the first sentence of the third paragraph hereof, for the reasons specified in the third sentence of such paragraph, then (whether or not BEPW is the Indemnified Person) the Association and BEPW shall contribute to the losses, claims, damages, liabilities and expenses for which such indemnification or reimbursement is held unavailable in such proportion as is appropriate to reflect the relative degree of fault and benefits of the Association on the one hand, and BEPW on the other hand, in connection with the transaction or transactions contemplated by the Engagement Letter, subject to the limitation that in any event BEPW's aggregate contribution to all losses, claims, damages, liabilities and expenses with respect to which contribution is available hereunder shall not exceed

the amount of fees actually received by BEPW pursuant to the Engagement Letter unless such contribution arises out of the gross negligence or wilful misconduct of BEPW or any of its officers, directors, employees and affiliates.

In the event of administrative proceedings or litigation in connection with the services provided under the Engagement Letter, BEPW agrees that its representatives will testify or otherwise assist the Association in preparing for testimony, at the request of the Association. The Association will pay BEPW reasonable and customary additional compensation as agreed upon by BEPW and the Association to cover testifying in connection with such litigation and the preparation for such litigation, proceeding or testimony and will reimburse BEPW for all out-of-pocket expenses reasonably incurred by BEPW in connection therewith, including the fees and disbursements of its legal counsel.

Sincerely,

ATLANTIC FEDERAL SAVINGS
AND LOAN ASSOCIATION OF
FORT LAUDERDALE

By: _____

Accepted as of the date
first indicated above:

BLYTH EASTMAN PAIN WEBBER
INCORPORATED

By: _____

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 87-6643-CIV-SCOTT

BANKATLANTIC, a federal savings bank,
f/k/a ATLANTIC FEDERAL SAVINGS AND LOAN
ASSOCIATION OF FT. LAUDERDALE,

Plaintiff,

v.

BLYTHE EASTMAN PAINE WEBBER, INC.,
n/k/a PAINE WEBBER, INC.,

Defendant.

COUNTERCLAIM

Counterplaintiff PaineWebber, Inc. ("PaineWebber"), hereby sues counterdefendant, BankAtlantic, a federal savings bank, f/k/a Atlantic Federal Savings & Loan Association of Ft. Lauderdale ("BankAtlantic"), and alleges:

1. This is an action for damages in excess of $10,000.00 exclusive of interest and costs, and involves a controversy between citizens of different states. This Court has jurisdiction under 28 U.S.C. §1332.

2. This is a compulsory counterclaim which arises out of the same transaction or occurrence that is the subject matter of BankAtlantic's claim and does not require for its adjudication the presence of third parties of whom the Court cannot acquire jurisdiction.

3. PaineWebber is incorporated under the laws of the State of Delaware with its principal place of business in New York.

4. BankAtlantic is a federally chartered savings and loan association doing business in the State of Florida with its principal place of business in Ft. Lauderdale, Florida.

5. PaineWebber was retained by BankAtlantic pursuant to an "engagement letter," which was executed by representatives for each party and dated March 20, 1984. A copy of the engagement letter is attached hereto as Exhibit "A".

6. The engagement letter outlined the services to be performed by PaineWebber for BankAtlantic, and discussed PaineWebber's right to compensation and indemnification from BankAtlantic. The engagement letter specifically referred to the standard indemnification agreement required by PaineWebber from all of its clients for the types of services covered by this engagement. PaineWebber's standard indemnity and damage limitation agreement was referenced in and attached to the engagement letter.

7. PaineWebber's standard indemnity and damage limitation agreement was reviewed and modified by counsel for BankAtlantic; and thereafter executed by representatives for each party under date of March 20, 1984. A copy of the agreement is attached hereto as Exhibit "B."

8. PaineWebber performed each of the services required by the engagement letter attached as Exhibit "A."

9. Notwithstanding PaineWebber's performance of its contractual obligations, BankAtlantic terminated PaineWebber's engagement. Upon information and belief, BankAtlantic terminated PaineWebber's engagement in order to avoid paying PaineWebber a fee of $150,000.00

on June 30, 1985, which sum would be due if BankAtlantic continued to be "independent."

10. BankAtlantic specifically agreed in the engagement letter, attached as Exhibit "A," that BankAtlantic's indemnity and damage limitation agreement would survive the completion of PaineWebber's services or any termination of PaineWebber's engagement.

11. Pursuant to the indemnity and damage limitation agreement, BankAtlantic agreed to indemnify and hold harmless PaineWebber from and against any and all losses, claims, damages and liabilities to which PaineWebber might become subject which are related to or arise out of PaineWebber's actions and inactions under the engagement letter and/or related to or arising out of actions taken or omitted to be taken by PaineWebber with BankAtlantic's consent or in conformity with the instructions of, or actions taken or omitted to be taken by, BankAtlantic. BankAtlantic further agreed to reimburse PaineWebber for any reasonable expenses incurred, including reasonable attorney's fees and costs, in connection with the investigation of or preparation for or defense of any formal or informal claim, action or other proceeding caused by or arising out of or in connection with PaineWebber's actions or inactions pursuant to the engagement letter.

12. The indemnity and damage limitation agreement was intended to cover and apply to any direct action by BankAtlantic against PaineWebber, whether brought by BankAtlantic management at the time services were rendered, subsequent management or by minority shareholders through a derivative action. The indemnity and damage limitation agreement also was intended to apply to any third party claim against PaineWebber.

13. In 1987, BankAtlantic sued PaineWebber for PaineWebber's alleged action and inactions related to or arising out of PaineWebber's performance of its obligations under the engagement letter and/or other actions taken or omitted to be taken by PaineWebber with BankAtlantic's consent or in conformity with the instructions of, or actions taken or omitted to be taken by, BankAtlantic. This event triggered BankAtlantic's obligation under the indemnity and damage limitation agreement, attached as Exhibit "B," to indemnify and hold harmless PaineWebber from and against any and all losses, claims, damages and liabilities to which PaineWebber has become subject to as a result of BankAtlantic's lawsuit. The indemnity and damage limitation agreement was specifically intended to prevent precisely this type of lawsuit, by shifting the economic risk of any such action from PaineWebber to BankAtlantic, except in cases of willful misconduct or gross negligence. PaineWebber has committed no willful misconduct or gross negligence.

14. All conditions precedent to the filing of this action have occurred, have been performed or have been waived.

15. As a direct consequence of BankAtlantic filing suit against PaineWebber, PaineWebber has been required to retain counsel and incur attorney's fees and costs in defending against that action.

16. By entering into the written indemnity and damage limitation agreement, which is attached as Exhibit "B" and incorporated by reference herein, BankAtlantic obligated itself to indemnify and hold harmless PaineWebber from and against any and all losses, claims, damages and liabilities to which PaineWebber may become subject related to or arising out of its representation of BankAtlantic.

17. By filing a lawsuit against PaineWebber, BankAtlantic triggered its obligations under the indemnity and damage limitation agreement to indemnify and hold harmless PaineWebber.

18. BankAtlantic has breached the indemnity and damage limitation agreement by failing to indemnify and hold harmless PaineWebber as required by its agreement.

19. As a direct and proximate result of BankAtlantic's breach of the indemnity and damage limitation agreement, PaineWebber has suffered damages.

WHEREFORE, PaineWebber demands judgment against BankAtlantic for damages, interest, costs and such further and other relief as this Court deems proper.

TEW JORDEN SCHULTE & BEASLEY
Attorneys for CounterPlaintiff
PaineWebber, Inc.
701 Brickwell Avenue
Miami, Florida 33131
(305) 371-2600

By: _____
JOHN H. SCHULTE

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was hand-delivered to Eugene Stearns, Esq., Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A., Attorneys for Plaintiff, 2200 Museum Tower, 150 West Flagler Street, Miami, Florida 33130, this 1st day of September, 1989.

_____

Of Counsel

EXHIBIT "A"

BLYTH EASTMAN PAINE WEBBER
INCORPORATED
1221 Avenue of the Americas
New York, New York 10020
(212) 730-8500

March 20, 1984

Mr. Donald V. Streeter
President, Chairman of the Board,
and Chief Executive Officer
Atlantic Federal Savings and Loan
Association of Fort Lauderdale
1750 East Sunrise Boulevard
Fort Lauderdale, Florida 33304

Dear Don:

This Letter Agreement is to confirm that Blyth Eastman Paine Webber Incorporated ("BEPW") has been retained by Atlantic Federal Savings and Loan Association of Fort Lauderdale ("Atlantic Federal" or the "Association") as financial advisor. A summary of the services which we will provide under this engagement and the compensation therefor follows.

Financial Analysis of the Association

We will undertake an analysis of Atlantic Federal as follows:

1. The preparation of a study framework of the Association which will include:

a. A review and analysis of the Association's operating results;

b. A review and analysis of the Association's lending and investment activities;

c. A review and analysis of the Association's deposit-taking and borrowing activities;

d. A review and analysis of the Association's primary market area, including the competitive and economic environment, and the population, personal income, unemployment and housing characteristics thereof;

e. A review of comparable savings and loan associations;

f. A review of recent purchase and sale transactions of generally similar associations and financial institutions, as appropriate.

2. A review and analysis of the Association's financial performance, including profitability, growth, financial condition and components of income and expense.

The steps to be taken to perform the above-stated work will include, but not be limited to:

1. A review of the Association's last five years' audited financial statements.

2. A review of the Association's Annual Report to Stockholder's forms 10-K and 10-Q, semi-annual Federal Home Loan Bank reports and other reports filed with the Federal Home Loan Bank of Atlanta or the Federal Home Loan Bank Board.

3. Visits to Atlantic Federal's facilities, as appropriate.

4. Discussions with management concerning the Association's business and its outlook, including future operating plans, goals and objectives.

5. Such other reviews and analyses as we deem appropriate to aid in completing our valuation work.

Advisory Issues/Stockholder Interests

We will advise the Association, in coordination with Atlantic Federal and its legal counsel, in the determination of whether certain actions by third parties are in the best interests of the Association and its stockholders. If such actions are deemed not to be, we will assist the Association in coordination with its counsel in developing a strategy to deal with those actions. In connection with these issues, BEPW will review, among other things, the following:

1. The market for and trading history of the Association's shares.

2. The stockholder composition of Atlantic Federal, including analysis of CEDE accounts, with emphasis and attention to dissident interests.

3. Communication policy between the Association and the investment community in general.

4. Third party actions which Atlantic Federal might initiate which are determined to be in the best interest of the stockholders.

Compensation and Indemnification

Our engagement fee covering the services outlined in this letter is $100,000, $50,000, payable upon execution of this agreement and $50,000 payable September 30, 1984. In addition, Atlantic Federal will pay BEPW a quarterly retainer of $25,000 for assistance in developing strategies with regard to dissident interests and other issues relating to stockholder interests. Quarterly retainer payments will commence with the first quarter of calendar year 1985 and shall thereafter be due and payable as of the last business day of each calendar quarter thereafter (commencing March 29, 1985) unless the engagement of BEPW hereunder is terminated as hereafter provided. If

Atlantic Federal is independent on June 30, 1985, the Association will pay BEPW a fee of $150,000 for its general consulting and advisory services. For purposes of this letter, the term "independent" shall mean that (i) no person (as the term "person" is used in Section 13(d) or 14(d)(2) of the Securities Exchange Act of 1934, as amended) shall have acquired beneficial ownership of more than 50% of the issued and outstanding shares of common stock of the Association or shall have offered to purchase such number of shares of common stock which offer shall not have thereafter been withdrawn or preliminarily enjoined and (ii) individuals who as of the date thereof constituted a majority of the Board of Directors cease for any reason to constitute a majority thereof by or as of June 30, 1985 unless the election, or the nomination for election, by the Association's shareholders of each new Director of the Association was approved by a vote of a majority of the Directors of the Association who were Directors as of the date hereof.

In the event that BEPW is requested to render an opinion as to fairness or adequacy from a financial point of view of any unsolicited offer involving the Association, we will review with you the questions of an additional fee in an amount up to $100,000, depending upon the complexity and use of the opinion and other factors. In connection with a proxy contest or an unsolicited offer involving the Association or a related transaction, BEPW would receive such additional fees as we would mutually agree upon at the time of such event. In connection with any and all of the services described above, BEPW will be reimbursed for its reasonable out-of-pocket expenses, including reasonable fees and disbursements of BEPW counsel.

In addition, during the period of the engagement of BEPW hereunder Atlantic Federal will give BEPW a

right of first refusal to act as financial advisor with regard to any transaction not contemplated by this agreement at standard rates of compensation. In the event that financing requiring an intermediary is related to our activities under this engagement, Atlantic Federal agrees that BEPW will have the exclusive right to act as agent or managing underwriter in connection with such financing.

This engagement may be terminated by either party upon 30 days written notice to the other, provided however, that any remaining amount of the retainer will come due on the date of termination, except that (i) the Association shall have no obligation to pay any amount otherwise payable pursuant to the last sentence of the first paragraph of this Section captioned "Compensation and Indemnification" if this engagement is terminated by notice given within 75 calendar days of the date hereof, unless the Association is "independent" (as defined above) on June 30, 1985 as a result, directly or indirectly, of the activities of BEPW pursuant to this Letter Agreement, and (ii) the Association shall have no obligation to make any quarterly retainer payments hereunder for any quarter following the quarter in which any notice of termination is given hereunder.

BEPW requires standard indemnification covering our use of the information supplied by you to us and our actions which we undertake on your behalf. Such indemnification will survive the completion of services or any determination of BEPW's engagement hereunder. A copy of the Indemnification Agreement is attached. Please sign and return this document with this letter agreement.

We believe that our record in furthering the objectives of our clients speaks for itself, and we are confident that we can help Atlantic Federal achieve its objectives in this undertaking. We look forward to working with you on this assignment.

If the foregoing is acceptable to you, would you please sign the enclosed copy of this letter and return it to us.

Sincerely

BLYTH EASTMAN PAINE
WEBBER INCORPORATED

By: _____
Kenneth L. Rilander
Managing Director

By: _____
Carole Lewis Anderson
Managing Director

Agreed to as of March 20, 1984

ATLANTIC FEDERAL SAVINGS
AND LOAN ASSOCIATION
OF FORT LAUDERDALE

By: _____

EXHIBIT "B"

Atlantic Federal Savings and Loan
Association of Fort Myers
1750 East Sunrise Boulevard
Fort Lauderdale, Florida 33304

March 20, 1984

Blyth Eastman Paine Webber Incorporated
1221 Avenue of the Americas
New York, New York 10020

Dear Sirs:

This letter will confirm certain arrangements that we have agreed upon in connection with Atlantic Federal Savings and Loan Association of Fort Lauderdale (the "Association") retaining Blyth Eastman Paine Webber Incorporated ("BEPW") to represent the Association exclusively as financial advisor pursuant to the engagement letter dated today's date between BEPW and the Association (the "Engagement Letter").

In connection with BEPW's services, the Association will furnish or cause to be furnished to BEPW such information and data (hereinafter referred to as the "Information") relating to the Association as BEPW reasonably requests. The Association also will use its best efforts to provide BEPW with reasonable access to the Association's officers, directors, employees and independent accountants. BEPW agrees that the Information, whether oral or written, will be kept confidential by BEPW and by its officers, employees and agents, will be disclosed by BEPW only to such officers, employees and agents of BEPW and its affiliates as need to know the Information in connection with the performance of BEPW's services under the Engagement Letter, and will be used only for purposes of such engagement; and

BEPW agrees that the provisions of this sentence shall survive any termination of BEPW's engagement under the Engagement Letter. The Association recognizes and confirms that in BEPW's performance of its services under the Engagement Letter (a) BEPW may rely upon the Information without independent verification, (b) BEPW does not assume responsibility for the accuracy or completeness thereof whether or not it makes an independent verification, and (c) BEPW will not make nor cause to have made an independent appraisal of the assets of the Association except to the extent provided in the Engagement Letter.

Since BEPW will be acting on behalf of the Association, the Association agrees that it will indemnify and hold harmless BEPW, its officers, directors, agents, employees and affiliates and each person, if any, who controls BEPW within the meaning of Section 15 of the Securities Act of 1933 or Section 20(a) of the Securities Exchange Act of 1934 (BEPW and each such entity and person being hereinafter called an "Indemnified Party") from and against any and all losses, claims, damages and liabilities to which such Indemnified Party may become subject which are (A) related to or arising out of (i) actions taken or omitted to be taken (including any untrue statements made or any statements omitted to be made) by the Association or (ii) actions taken or omitted to be taken by an Indemnified Party with the Association's consent or in conformity with the instructions of, or actions taken or omitted to be taken by, the Association or (B) otherwise related to or arise out of BEPW's acting pursuant to the covenants contained in the section captioned "Financial Analysis of the Association" and "Advisory Issues/Stockholder Interests" in the Engagement Letter. The Association also agrees to reimburse each Indemnified Party for any reasonable expenses incurred (including reasonable fees and disbursements of counsel)

in connection with the investigation of or the preparation for or defense of any formal or informal claim, action, investigation or other proceeding caused by or arising out of or in connection with BEPW's acting pursuant to the Engagement Letter, whether or not BEPW is named party thereto and whether or not any liability results therefrom. The Association will not, however, be responsible for any losses, claims, damages or liabilities (i) for which indemnification is sought solely pursuant to clause (B) of the first sentence of this paragraph which a court of competent jurisdiction shall have determined by a final judgment to have primarily resulted from wilful misconduct or gross negligence on the part of the Indemnified Party seeking indemnification hereunder, or for expenses incurred by such Indemnified Party in connection with such losses, claims, damages or liabilities or (ii) arising out of any settlement by an Indemnified Party of any claim, action or proceeding entered into by or on behalf of such Indemnified Party without the Association's prior written consent.

Promptly after receipt by any Indemnified Party of notice of any complaint, the commencement of any action or proceeding or the actual receipt of written notice of any claim in connection with any matter related to BEPW's activities pursuant to the Engagement Letter. BEPW will notify the Association in writing of such complaint or of the commencement of such action or proceeding or the actual receipt of written notice of any claim and if the Association so elects or is requested by BEPW, the Association will assume the defense of such action, proceedings, or claim, including the employment of counsel reasonably satisfactory to BEPW and the payment of the fees and disbursements of such counsel, in which event the Association shall not be obligated to pay the fees and disbursements of separate counsel for BEPW in such action. In the event, however, that

BEPW's legal counsel shall reasonably determine that defenses may be available to an Indemnified Party that are different from or in addition to those available to the Association or that there is or could reasonably be expected to be a conflict of interest by reason of the Association and an Indemnified Party having common counsel in any action or proceeding, or if the Association has not assumed the defense of any action or proceeding, then BEPW may employ separate counsel to represent or defend it or any Indemnified Party in any such action or proceeding in which it or such Indemnified Party may become involved or is named as defendant and the Association shall pay the reasonable fees and disbursements of such separate counsel; *provided* that the Association shall not be obligated to pay the fees and disbursements of more than one such separate counsel for any one such action or proceeding in any one jurisdiction.

The Association and BEPW agree that if any indemnification or reimbursement sought by an Indemnified Party pursuant to this agreement is held by a court to be unavailable for any reason except, with respect to indemnification sought solely pursuant to clause (B) of the first sentence of the third paragraph hereof, for the reasons specified in the third sentence of such paragraph, then (whether or not BEPW is the Indemnified Person) the Association and BEPW shall contribute to the losses, claims, damages, liabilities and expenses for which such indemnification or reimbursement is held unavailable in such proportion as is appropriate to reflect the relative degree of fault and benefits of the Association on the one hand, and BEPW on the other hand, in connection with the transaction or transactions contemplated by the Engagement Letter, subject to the limitation that in any event BEPW's aggregate contribution to all losses, claims, damages, liabilities and expenses with respect to which contribution is available hereunder shall not exceed

the amount of fees actually received by BEPW pursuant to the Engagement Letter unless such contribution arises out of the gross negligence or wilful misconduct of BEPW or any of its officers, directors, employees and affiliates.

In the event of administrative proceedings or litigation in connection with the services provided under the Engagement Letter, BEPW agrees that its representatives will testify or otherwise assist the Association in preparing for testimony, at the request of the Association. The Association will pay BEPW reasonable and customary additional compensation as agreed upon by BEPW and the Association to cover testifying in connection with such litigation and the preparation for such litigation, proceeding or testimony and will reimburse BEPW for all out-of-pocket expenses reasonably incurred by BEPW in connection therewith, including the fees and disbursements of its legal counsel.

Sincerely,

ATLANTIC FEDERAL SAVINGS
AND LOAN ASSOCIATION
OF FORT LAUDERDALE

By: _____

Accepted as of the date first indicated above:

BLYTH EASTMAN PAINE WEBBER
INCORPORATED

By: _____

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT

CASE NO. 87-6643-CIV-SCOTT

BANKATLANTIC, A FEDERAL SAVINGS BANK f/k/a/ ATLANTIC FEDERAL SAVINGS AND LOAN ASSOCIATION OF FORT LAUDERDALE,

Plaintiff,

vs.

BLYTHE EASTMAN PAINE WEBBER INCORPORATED, n/k/a PAINE WEBBER, INCORPORATED,

Defendant.

ORDER

THIS CAUSE being before this Court on several motions of both Plaintiff and Defendant, and having reviewed said motions in their entirety, finds as follows:

1. Plaintiff's Motion for Oral Argument as to all motions presently pending before this Court, DENIED.

2. Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction, DENIED.

3. Defendant's Motion to Dismiss for Failure to Plead a Case in Controversy, DENIED.

4. Defendant's Motion to Dismiss Count II, III, IV for failing to plead fraud with particularity, DENIED.

5. Defendant's Motion to Strike Punitive Damages is GRANTED with leave to amend. Plaintiff has failed to plead conduct rising to a level going beyond that of gross negligence. *Como Oil Company, Inc. v. O'Loughlin*, 446 So. 2d 1061 (Fla. 1985).

6. All other Motions not specifically addressed are hereby DENIED.

DONE and ORDERED in Chambers at Miami, Florida, this 21st day of March, 1988.

THOMAS E. SCOTT
UNITED STATES
DISTRICT JUDGE

cc: STEARNS WEAVER MILLER, et al.
RUDEN BARNETT McCLOSKY, et al.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 87-6643-CIV-SCOTT

ATLANTIC FEDERAL SAVINGS AND LOAN ASSOCIATION OF FT. LAUDERDALE,

Plaintiff,

vs.

BLYTH EASTMAN PAINE WEBBER INCORPORATED, n/k/a PAINE WEBBER, INCORPORATED,

Defendant.

AMENDED COMPLAINT

Plaintiff, Atlantic Federal Savings and Loan Association of Fort Lauderdale ("Atlantic Federal"), hereby sues defendant, Blyth Eastman Paine Webber Incorporated ("BEPW"), and alleges as follows:

PARTIES, JURISDICTION AND VENUE

1. This is an action for money damages in excess of $10,000 exclusive of interest and costs, and involves a controversy between citizens of different states. 28 U.S.C. § 1332.

2. Plaintiff Atlantic Federal is a federally chartered savings and loan association doing business in the State of Florida with its principal place of business in Fort Lauderdale, Florida.

3. Defendant BEPW is incorporated under the laws of the State of New York with its principal place of business in New York. BEPW is doing business in the State of Florida.

4. Subsequent to the acts of defendant giving rise to this lawsuit, BEPW was acquired by Paine Webber, Incorporated ("Paine Webber"). Paine Webber is incorporated under the laws of the State of Delaware with its principal place of business in New York. Paine Webber is doing business in the State of Florida.

FACTS

Atlantic Federal: From Small Mutual to a Public Company

5. From its inception in 1952 until 1983, Atlantic Federal was a federally chartered mutual savings and loan association. As such, Atlantic Federal had no stockholders, and Atlantic Federal's management was responsible only to its depositors and to those government entities which regulated it.

6. In 1983, in order to increase its capital, Atlantic Federal converted from a mutual association to a publicly held stock company. While the conversion raised capital for Atlantic Federal, it created a series of unprecedented challenges and difficulties for Atlantic Federal's management.

7. At the time, Atlantic Federal was managed by a group of officers and directors who had experience in dealing with the problems of a relatively small mutual association. Its management, however, did not have the experience required to deal with the myriad duties and responsibilities of a public company which answered not only to its depositors and regulators, but to its shareholders and the public markets for its stock.

8. Management's concerns were exacerbated by two independent economic factors. First, high interest rates and the deregulation of banking were making it increas-

ingly difficult for management to profitably operate the association. Second, a number of entities had assembled sizeable blocks of Atlantic Federal's new common stock. Atlantic Federal's management itself owned little of the association's stock. Management was faced with dealing with public shareholders, changing market conditions, and insecurity with respect to their future employment.

BEPW Solicits Atlantic Federal

9. During this period, BEPW had been performing some limited brokerage functions on behalf of Atlantic Federal. BEPW had become aware of the fact that certain entities had assembled blocks of Atlantic Federal stock. BEPW perceived Atlantic Federal as a company with weak management from which BEPW could extract sizeable fees and commissions in exchange for comforting advice. BEPW told the management of Atlantic Federal that it had special expertise which would aid management in fending off an unwanted takeover, and would help management better organize its assets and liabilities.

10. Beginning in early 1984, in reliance upon BEPW's representations of special expertise, the management of Atlantic Federal retained BEPW as "financial advisor." Atlantic and BEPW memorialized their arrangement in a document referred to as an "Engagement Letter" which was executed by representatives for each party and dated March 20, 1984. A copy of that letter is attached hereto as Exhibit "A."

11. As memorialized in the Engagement Letter, BEPW undertook to perform a thorough analysis of Atlantic Federal's operations and business plan. Specifically, BEPW undertook to analyze, among other factors, (i) Atlantic Federal's operating results, (ii) its lending and investment activities, and (iii) its deposit-taking and borrowing activities. BEPW was also retained to advise

Atlantic Federal "whether certain actions by third parties [were] in the best interests of the Association and its stockholders." If such actions were not deemed to be in the best interests of Atlantic Federal and its stockholders, BEPW undertook to work with Atlantic Federal and its counsel to develop a strategy to deal with these actions. In return for these services, the agreement provided that BEPW be paid $100,000. $50,000 was actually invoiced and paid by Atlantic Federal.

The Effect of High Interest Rates on Atlantic Federal

12. With regard to its financial condition, Atlantic Federal's management was at the time it retained BEPW concerned about the negative impact caused by the preceding years of double-digit inflation. Because Atlantic Federal's assets were essentially in the form of long-term mortgages fixed at relatively low interest rates, it faced large losses during the years in which its cost of funds, which was variable, soared. During this period, Atlantic Federal was faced with what is known as a "negative spread." That is, the market cost of funds which Atlantic Federal was required to pay to its depositors had increased to a point where this cost was greater than the revenue which Atlantic Federal was receiving on its portfolio of mostly fixed-rate mortgages. This problem was, to a great degree, common throughout the savings and loan industry.

13. Ironically, by 1984 Atlantic Federal had suffered through and survived the worst of the problems caused by high interest rates and the resultant negative spread. As interest rates had reached their peak in earlier years, Atlantic Federal had systematically retired older, low interest rate mortgages and replaced them in its portfolio with newer, higher rate and adjustable rate mortgages. Atlantic Federal's management, however, was still badly

shaken by the upheavals of the previous years, and was particularly susceptible to advice — be it good or bad — which they hoped would protect them from a recurrence of this problem.

BEPW Takes Advantage of Atlantic Federal's Fears

14. By early 1984, BEPW has begun to regularly advise Atlantic Federal's management with regard to perceived takeover threats and management began to look to BEPW as valued and trusted advisors. BEPW took steps to foster such an image with Atlantic Federal's management.

15. In addition to being advisors, BEPW's personnel were also salesmen. After having achieved a position of trust and confidence, BEPW's salesmen began to offer Atlantic Federal the opportunity to participate in transactions purportedly aimed at providing Atlantic Federal with protection from future interest rate risk.

The "Interest Rate Swap"

16. BEPW advised Atlantic Federal that a beneficial "hedge" against interest rate risk was an investment device known as an "interest rate swap." In fact, in the form which BEPW proposed, such "interest rate swaps" offered Atlantic Federal no real protection against rising interest rates. Instead, these swaps would result in substantial losses if interest rates dropped — which, in fact, they did.

17. BEPW told Atlantic Federal that a swap was necessary because too many of its liabilities were subject to variable rates, while the return on many of its mortgage portfolio assets were fixed. BEPW warned Atlantic Federal that if interest rates were to rise again, Atlantic Federal could be forced to pay for its funds at a rate higher than the rate of return on its fixed rate mortgages.

Atlantic Federal would again be faced with a "negative spread."

18. BEPW counselled Atlantic Federal that it should enter into a transaction with another institution in which Atlantic Federal could "swap" a portion of its debt obligations subject to variable rates for debt obligations subject to fixed rates. This would be accomplished, BEPW explained, by entering into interest rate swaps with another financial institution.

19. Pursuant to the "swap", Atlantic Federal and its swap partner would not exchange principal obligations; rather, they would merely agree to compensate each other in such a manner equivalent to Atlantic Federal paying a fixed rate of interest on an agreed-upon principal amount, while its partner would assume interest obligations at a variable rate. In essence, Atlantic Federal would be "swapping" some of its variable-rate interest obligations for fixed rate obligations.

The Undisclosed Problems with the Swaps.

20. As marketed by BEPW, the interest rate swaps appeared to represent a solid and prudent vehicle to hedge against interest rate risk in the future. In fact, BEPW knew that these swaps, in the form marketed by BEPW, would provide no such protection for Atlantic Federal, but would in fact provide Atlantic Federal with only a lose/lose scenario. BEPW failed to provide Atlantic Federal with facts which would have been material to its investment decision. These facts include, but are not limited to, the following:

(a) BEPW recommended to Atlantic Federal two swaps in the principal amounts of $35,000,000 and $50,000,000, respectively. The total principal amount of Atlantic Federal's deposits was nearly $1.5 billion. The total principal amount of swaps,

therefore, was not of adequate size to provide a meaningful hedge against another spike in interest rates. Even with the swaps, the vast majority of Atlantic Federal's debt would still be subject to variable market interest rates. The relatively minimal protection provided by the swaps would not have been adequate to protect Atlantic Federal against the cataclysmic impact of another national bout with high interest rates. Conversely, if interest rates would fall (as in fact they did), the terms of the interest rate swap required Atlantic Federal to pay millions of dollars to its swap partner. BEPW failed to inform Atlantic Federal that under either scenario, Atlantic Federal would lose.

(b) BEPW sold the swap transactions to Atlantic Federal by convincing Atlantic Federal that it could "match" the fixed-rate obligation it would acquire against certain fixed-rate mortgages in its portfolio, and thereby "lock in" a profit. This "profit", however, was illusory. For instance, BEPW told Atlantic Federal that it could "match" $50,000,000 of its 13½% mortgages against a $50,000,000 swap transaction, which would "lock in" a cost-of-funds at a fixed-rate of 12.45%. BEPW failed to disclose to Atlantic Federal the illusory nature of this "locked in" profit. In fact, BEPW chose to "match" the cost of funds against some of Atlantic Federal's most profitable long-term mortgages. The average return on Atlantic Federal's mortgages was much lower than 13½%, and in fact, lower than 12.45%. In fact, BEPW was recommending a transaction which would "lock in" a loss.

(c) Moreover, BEPW failed to counsel Atlantic Federal that, if interest rates fell, customers would refinance and retire their 13½% mortgages. The

"locked in" profit against the 12.45% cost of funds was therefore doubly illusory.

(d) BEPW failed to disclose to Atlantic Federal that the results obtained through the interest rate swaps — assuming such results were in the best interest of Atlantic Federal — could be achieved through alternatives which would be less costly to Atlantic Federal.

(e) BEPW failed to disclose to Atlantic Federal that it was simultaneously providing investment advice and other services to Homestead Savings, the federal savings and loan association with which Atlantic Federal agreed to swap interest obligations. BEPW also failed to disclose to Atlantic Federal that Homestead was an improper partner for a swap transaction.

The Swap Agreements

21. On March 23, 1984 and August 3, 1984, in reliance on BEPW's advice, Atlantic Federal entered into Separate Interest Exchange Agreements with Homestead Savings. (Copies of those Agreements are attached hereto as Exhibits B and C, respectively.) In essence, the agreements provide for Atlantic Federal to "swap" amounts due on its variable rate obligations for amounts due on Homestead's fixed rate obligations at 12.00% and 12.45% respectively. Therefore, with reference to the first agreement, if the applicable interest rate is greater than 12%, Homestead was to pay Atlantic Federal the difference between the amount due on the variable rate and the amount due on 12%. Conversely, were the rate to dip below 12%, Atlantic Federal was (and is) obligated to pay to Homestead the difference between the amounts due on the fixed and variable rates.

A Guaranteed Loss For Atlantic Federal, and a Guaranteed Profit for BEPW

22. As shown in paragraph 19(a) above, it was impossible for Atlantic Federal to profit from the swap agreements, whether rates went up or down. BEPW, on the other hand, was the only party guaranteed a profit in these transactions. BEPW billed and collected from Atlantic Federal the sum of $175,000 for its "services" in "arranging" the first swap transaction.

23. Atlantic Federal's losses from these transactions have been staggering. Since early 1984, Atlantic Federal has incurred liabilities totalling $12,341,141.29 to Homestead under these Agreements, in addition to the $225,000 paid to BEPW for its "services" in "arranging" these transactions, and for providing investment advice.

COUNT I

BREACH OF FIDUCIARY DUTY

24. Atlantic Federal repeats and realleges paragraphs 1 through 23.

25. A financial advisor stands in a fiduciary relationship with its client, and, as a matter of law, custom and practice, is obligated to conduct itself with the utmost good faith.

26. Atlantic Federal, by engaging defendant as its financial advisor, reposed trust and confidence in defendant to discharge its responsibilities prudently, and act properly and carefully in the rendering of financial advice to Atlantic Federal. Specifically, Atlantic Federal placed its trust and confidence in defendant, who possessed superior knowledge to recommend an "interest rate swap" only after studying it sufficiently to become informed as to its nature, cost, risks, financial prognosis; to

inform Atlantic Federal of all of the risks involved in an "interest rate swap"; to make a full and fair disclosure of all material facts; to refrain from omitting material facts or misrepresenting any fact material to the "interest rate swap"; and to refrain from self-dealing.

27. Defendant owes Atlantic Federal a fiduciary duty of care and good faith in providing financial advice to the Atlantic Federal.

28. Defendant had breached its duty of care and good faith by failing to properly advise Atlantic Federal, as described above.

29. As a proximate cause of defendant's breach of its duty, Atlantic Federal has been damaged as set forth in paragraphs 22 and 23.

30. The defendant's conduct was reckless, willful and wanton, demonstrating an entire want of care and good faith and an inattention to duty.

WHEREFORE, Atlantic Federal demands judgment against defendant for compensatory and punitive damages, together with prejudgment interest and the costs of this action.

COUNT II

FRAUD

31. Atlantic Federal repeats and realleges paragraphs 1 through 23.

32. Defendant made misrepresentations to Atlantic Federal of facts material to the "interest rate swap," and failed to inform Atlantic Federal of certain material facts.

33. Defendant had superior knowledge of the complexities of and risks involved in an interest rate swap.

Defendant owes a duty of full disclosure of material facts to Atlantic Federal and is charged with the knowledge of the truth or falsity of those representations.

34. Defendant knew or should have known of the falsity of its representations to Atlantic Federal, at the time made.

35. Defendant's misrepresentations and deliberate concealment of material facts were intentional and made for the purpose of inducing Atlantic Federal to enter into the "interest rate swap" with Homestead Savings.

36. Atlantic Federal has reasonably relied to its detriment on the correctness of defendant's representations and was induced thereby to enter into the "interest rate swap." But for defendant's misrepresentations and deliberate concealment of material facts concerning Atlantic Federal's risks, Atlantic Federal would not have entered into the "interest rate swap" with Homestead Savings.

37. As a direct and proximate result of defendant's intentional misrepresentations and deliberate concealment of material facts, Atlantic Federal has been severely damaged as set forth in paragraphs 22 and 23.

38. Defendant's conduct was knowing and intentional, and demonstrates an entire want of care and disregard for the rights of the Atlantic Federal.

WHEREFORE, Atlantic Federal demands judgment against defendant for compensatory and punitive damages, together with prejudgment interest and the costs of this action.

COUNT III

CONSTRUCTIVE FRAUD

39. Atlantic Federal repeats and realleges paragraphs 1 through 23.

40. A financial advisor stands in a fiduciary relationship with its client, and, as a matter of law, custom and practice, is obligated to conduct itself with the utmost good faith.

41. Atlantic Federal, by engaging defendant as its financial advisor, reposed trust and confidence in defendant to discharge its responsibilities prudently, and act properly and carefully in the rendering of advice to Atlantic Federal. Specifically, Atlantic Federal placed its trust and confidence in defendant, who possessed superior knowledge, to recommend an "interest rate swap" only after studying it sufficiently to become informed as to its nature, cost, risks and financial prognosis; to inform Atlantic Federal of all of the risks involved in an "interest rate swap"; to make a full and fair disclosure of all material facts; to refrain from omitting material facts or misrepresenting any fact material to the "interest rate swap"; and to refrain from self-dealing.

42. Defendant owes Atlantic Federal a fiduciary duty of care and good faith in providing financial advice to Atlantic Federal.

43. Defendant made misrepresentations to Atlantic Federal, and failed to disclose to Atlantic Federal, facts material to the "interest rate swap."

44. Defendant knew or should have known of the falsity of its representations at the time made.

45. Defendant made such misrepresentations to Atlantic Federal, for the purpose of inducing Atlantic Fed-

eral to rely on them and enter into the "interest rate swap."

46. Atlantic Federal reasonably relied, to its detriment, on the correctness of defendant's representation and was induced thereby to enter into the "interest rate swap." But for the defendant's misrepresentations and concealment of material facts concerning Atlantic Federal's risks, Atlantic Federal would not have entered into the "interest rate swap" with Homestead Savings.

47. As a proximate result of defendant's misrepresentation and omissions of material facts, Atlantic Federal has been severely damaged as set forth in paragraphs 22 and 23.

48. Defendant's conduct was knowing and intentional, and demonstrates an entire want of care and disregard for the rights of the Atlantic Federal.

WHEREFORE, Atlantic Federal demands judgment against defendant for compensatory and punitive damages, together with prejudgment interest and the costs of this action.

COUNT IV

FRAUDULENT CONCEALMENT

49. Atlantic Federal repeats and realleges paragraphs 1 through 23.

50. Defendant had superior knowledge of investment instruments and the financial markets. Defendant owes a duty of full disclosure to Atlantic Federal of the risks involved in any transaction in which it advises Atlantic Federal.

51. Defendant intentionally and deliberately concealed facts material to the "interest rate swap" from

Atlantic Federal, including facts not discoverable by ordinary observation, and has engaged in trickery to defraud Atlantic Federal.

52. Defendant intentionally and deliberately concealed material facts from the Atlantic Federal for the purposes of inducing Atlantic Federal to rely thereon.

53. Atlantic Federal did rely to their detriment on the correctness and completeness of the defendant's representations, and was induced thereby to enter into the "interest rate swap." But for the defendant's intentional and deliberate active concealment of material facts concerning Atlantic Federal's risks, Atlantic Federal would not have entered into the "interest rate swap" with Homestead Savings.

54. As a proximate result of defendant's intentional and deliberate active concealment of material facts, Atlantic Federal has been severely damaged as set forth in paragraphs 22 and 23.

55. Defendant's conduct was knowing and intentional, and demonstrates an entire want of care and disregard for the rights of the Atlantic Federal.

WHEREFORE, Atlantic Federal demands judgment against defendant for compensatory and punitive damages, together with prejudgment interest and the costs of this action.

COUNT V

NEGLIGENT MISREPRESENTATION

56. Atlantic Federal repeats and realleges paragraphs 1 through 23.

57. Defendant made misrepresentations to Atlantic Federal of facts material to the "interest rate swap."

58. Defendant had superior knowledge of the complexities and risks involved in an interest rate swap. Defendant owes a duty of full disclosure of material facts to Atlantic Federal, and is changed with the knowledge of the truth or falsity of those representations.

59. Defendant knew or should have known of the falsity of its representations to the Atlantic Federal, at the time made.

60. Defendant's misrepresentation of material facts were made for the purpose of inducing Atlantic Federal to enter into the "interest rate swap" with Homestead Savings.

61. Atlantic Federal reasonably relied, to its detriment, on the defendant's representations. As a direct and proximate result of defendant's misrepresentations of material facts, Atlantic Federal has been severely damaged as set forth in paragraphs 22 and 23.

62. Defendant's conduct was knowing and intentional, and demonstrates an entire want of care and disregard for the rights of the Atlantic Federal.

WHEREFORE, Atlantic Federal demands judgment against defendant for compensatory and punitive damages, together with prejudgment interest and the costs of this action.

COUNT VI

NEGLIGENCE

63. Atlantic Federal repeats and realleges paragraphs 1 through 23.

64. Under the Engagement Letter, defendant had a duty to exercise care in the review and analysis of, among other things, Atlantic Federal's operating results, and

lending and investment activities, and in providing advice to Atlantic Federal.

65. Defendant, as Atlantic Federal's investment advisor, owed Atlantic Federal a duty to exercise care to research and determine the costs, risks and financial prognosis of an interest rate swap before advising Atlantic Federal; a duty to exercise care in informing Atlantic Federal of the risks involved in an interest rate swap; a duty to refrain from self-dealing; a duty to fully and accurately represent material facts; and a duty to properly supervise its employees, agents, associates, brokers and advisors in advising the Atlantic Federal.

66. Defendant specifically represented that it possessed the requisite skill and knowledge, and would exercise due care in performing these duties.

67. Defendant failed to exercise due care in performing the duties owed to Atlantic Federal.

68. Defendant's conduct was reckless, willful and wanton, demonstrating an entire want of care and good faith, and an inattention to duty.

69. By reason of defendant's negligence, Atlantic Federal has been severely damaged as set forth in paragraphs 22 and 23.

WHEREFORE, Atlantic Federal demands judgment against defendant for compensatory and punitive damages, together with prejudgment interest and the costs of this action.

COUNT VII

BREACH OF CONTRACT

70. Atlantic Federal repeats and realleges paragraphs 1 through 23.

71. As set forth above, Atlantic Federal retained defendant as "financial advisor," and memorialized their arrangement in a document referred to as the Engagement letter. The Engagement Letter was executed by representatives of Atlantic Federal and defendant, and dated March 20, 1984.

72. Defendant breached the terms of the Engagement Letter by failing to perform the services defendant agreed to provide in consideration of compensation from Atlantic Federal, as provided in the Engagement Letter.

73. The Engagement Letter contained an implied covenant to act in good faith and of fair dealing between the parties. Defendant breached its obligation to act in good faith by failing to comply with the terms of the Engagement Letter.

74. As a result of defendant's breach, Atlantic Federal has been damaged as set forth in paragraphs 22 and 23.

WHEREFORE, Atlantic Federal demands judgment against defendant for compensatory damages, together with prejudgment interest and the costs of this action.

COUNT VIII

PROFESSIONAL MALPRACTICE

75. Atlantic Federal repeats and realleges paragraphs 1 through 23.

76. Defendant has held itself out to be a licensed investment advisor under the Florida Securities and Investor Protection Act, and represented that its employees, agents, brokers, and advisors possessed the requisite skills and knowledge and would exercise due care in performing its duties as a financial advisor.

77. Atlantic Federal retained defendant as a "financial advisor" as memorialized in the Engagement Letter entered into by Atlantic Federal and defendant, and dated March 20, 1984.

78. Defendant undertook to conduct research on various vehicles for investment and fiscal planning and to provide advice to Atlantic Federal on such matters. Defendant had a duty to exercise due care as a professional with special knowledge, intellect and ability in the researching and advising of Atlantic Federal on various investment opportunities. Furthermore, defendant was obliged to provide full disclosure of facts material to these opportunities, including the interest rate swap.

79. Defendant failed to exercise the due care required of a professional with special knowledge, intellect and ability.

80. But for the defendant's failure to exercise the due care expected of a financial advisor performing such duties, Atlantic Federal would not have entered into the "interest rate swap."

81. By reason of defendant's failure to exercise care in the performance of its duties, Atlantic Federal has been damaged as set forth in paragraphs 22 and 23.

82. The conduct of defendant was reckless, willful and wanton, demonstrating an entire want of care and good faith and an inattention to duty.

WHEREFORE, Atlantic Federal demands judgment against defendant for compensatory and punitive damages, together with prejudgment interest and the costs of this action.

Respectfully submitted,

STEARNS WEAVER MILLER
WEISSLER ALHADEFF &
SITTERSON, P.A.
Attorneys for Plaintiff
2200 Museum Tower
150 West Flagler Street
Miami, Florida 33130
(305) 789-3200

By: _____
EUGENE E. STEARNS
ALAN H. FEIN
LISA K. BENNETT
M. SCOTT KLEIMAN

Dated December 23, 1987

DEMAND FOR JURY TRIAL

Plaintiff, pursuant to Rule 38(b), Fed. R. Civ. P., hereby demands trial by jury of all issues so triable.

Respectfully submitted,

STEARNS WEAVER MILLER
WEISSLER ALHADEFF &
SITTERSON, P.A.
Attorneys for Plaintiff
2200 Museum Tower
150 West Flagler Street
Miami, Florida 33130
(305) 789-3200

By: _____
EUGENE E. STEARNS
ALAN H. FEIN
LISA K. BENNETT
M. SCOTT KLEIMAN

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 23rd day of December, 1987 to: BENNETT FALK, ESQ., Ruden, Barnett, McClosky, Smith, Schuster & Russell, P.A., One Biscayne Tower, Suite 2020, Miami, FL 33131.

By: _____
LISA K. BENNETT

EXHIBIT "A"

BLYTH EASTMAN PAINE WEBBER
INCORPORATED
1221 Avenue of the Americas
New York, New York 10020
(212) 730-8500

March 20, 1984

Mr. Donald V. Streeter
President, Chairman of the Board,
and Chief Executive Officer
Atlantic Federal Savings and Loan
Association of Fort Lauderdale
1750 East Sunrise Boulevard
Fort Lauderdale, Florida 33304

Dear Don:

This Letter Agreement is to confirm that Blyth Eastman Paine Webber Incorporated ("BEPW") has been retained by Atlantic Federal Savings and Loan Association of Fort Lauderdale ("Atlantic Federal" or the "Association") as financial advisor. A summary of the services which we will provide under this engagement and the compensation therefor follows.

Financial Analysis of the Association

We will undertake an analysis of Atlantic Federal as follows:

1. The preparation of a study framework of the Association which will include:

a. A review and analysis of the Association's operating results;

b. A review and analysis of the Association's lending and investment activities;

c. A review and analysis of the Association's deposit-taking and borrowing activities;

d. A review and analysis of the Association's primary market area, including the competitive and economic environment, and the population, personal income, unemployment and housing characteristics thereof;

e. A review of comparable savings and loan associations;

f. A review of recent purchase and sale transactions of generally similar associations and financial institutions, as appropriate.

2. A review and analysis of the Association's financial performance, including profitability, growth, financial condition and components of income and expense.

The steps to be taken to perform the above-stated work will include, but not be limited to:

1. A review of the Association's last five years' audited financial statements.

2. A review of the Association's Annual Report to Stockholder's forms 10-K and 10-Q, semi-annual Federal Home Loan Bank reports and other reports filed with the Federal Home Loan Bank of Atlanta or the Federal Home Loan Bank Board.

3. Visits to Atlantic Federal's facilities, as appropriate.

4. Discussions with management concerning the Association's business and its outlook, including future operating plans, goals and objectives.

5. Such other reviews and analyses as we deem appropriate to aid in completing our valuation work.

Advisory Issues/Stockholder Interests

We will advise the Association, in coordination with Atlantic Federal and its legal counsel, in the determination of whether certain actions by third parties are in the best interests of the Association and its stockholders. If such actions are deemed not to be, we will assist the Association in coordination with its counsel in developing a strategy to deal with those actions. In connection with these issues, BEPW will review, among other things, the following:

1. The market for and trading history of the Association's shares.

2. The stockholder composition of Atlantic Federal, including analysis of CEDE accounts, with emphasis and attention to dissident interests.

3. Communication policy between the Association and the investment community in general.

4. Third party actions which Atlantic Federal might initiate which are determined to be in the best interest of the stockholders.

Compensation and Indemnification

Our engagement fee covering the services outlined in this letter is $100,000, $50,000, payable upon execution of this agreement and $50,000 payable September 30, 1984. In addition, Atlantic Federal will pay BEPW a quarterly retainer of $25,000 for assistance in developing strategies with regard to dissident interests and other issues relating to stockholder interests. Quarterly retainer payments will commence with the first quarter of calendar year 1985 and shall thereafter be due and payable as of the last business day of each calendar quarter thereafter (commencing March 29, 1985) unless the engagement of BEPW hereunder is terminated as hereafter provided. If

Atlantic Federal is independent on June 30, 1985, the Association will pay BEPW a fee of $150,000 for its general consulting and advisory services. For purposes of this letter, the term "independent" shall mean that (i) no person (as the term "person" is used in Sections 13(d) or 14(d)(2) of the Securities Exchange Act of 1934, as amended) shall have acquired beneficial ownership of more than 50% of the issued and outstanding shares of common stock of the Association or shall have offered to purchase such number of shares of common stock which offer shall not have thereafter been withdrawn or preliminarily enjoined and (ii) individuals who as of the date thereof constituted a majority of the Board of Directors cease for any reason to constitute a majority thereof by or as of June 30, 1985 unless the election, or the nomination for election, by the Association's shareholders of each new Director of the Association was approved by a vote of a majority of the Directors of the Association who were Directors as of the date hereof.

In the event that BEPW is requested to render an opinion as to fairness or adequacy from a financial point of view of any unsolicited offer involving the Association, we will review with you the questions of an additional fee in an amount up to $100,000, depending upon the complexity and use of the opinion and other factors. In connection with a proxy contest or an unsolicited offer involving the Association or a related transaction, BEPW would receive such additional fees as we would mutually agree upon at the time of such event. In connection with any and all of the services described above, BEPW will be reimbursed for its reasonable out-of-pocket expenses, including reasonable fees and disbursements of BEPW counsel.

In addition, during the period of the engagement of BEPW hereunder Atlantic Federal will give BEPW a

right of first refusal to act as financial advisor with regard to any transaction not contemplated by this agreement at standard rates of compensation. In the event that financing requiring an intermediary is related to our activities under this engagement, Atlantic Federal agrees that BEPW will have the exclusive right to act as agent or managing underwriter in connection with such financing.

This engagement may be terminated by either party upon 30 days written notice to the other, provided however, that any remaining amount of the retainer will come due on the date of termination, except that (i) the Association shall have no obligation to pay any amount otherwise payable pursuant to the last sentence of the first paragraph of this Section captioned "Compensation and Indemnification" if this engagement is terminated by notice given within 75 calendar days of the date hereof, unless the Association is "independent" (as defined above) on June 30, 1985 as a result, directly or indirectly, of the activities of BEPW pursuant to this Letter Agreement, and (ii) the Association shall have no obligation to make any quarterly retainer payments hereunder for any quarter following the quarter in which any notice of termination is given hereunder.

BEPW requires standard indemnification covering our use of the information supplied by you to us and our actions which we undertake on your behalf. Such indemnification will survive the completion of services or any determination of BEPW's engagement hereunder. A copy of the Indemnification Agreement is attached. Please sign and return this document with this letter agreement.

We believe that our record in furthering the objectives of our clients speaks for itself, and we are confident that we can help Atlantic Federal achieve its objectives in this undertaking. We look forward to working with you on this assignment.

If the foregoing is acceptable to you, would you please sign the enclosed copy of this letter and return it to us.

Sincerely,

BLYTH EASTMAN PAINE
WEBBER INCORPORATED

By: _____
Kenneth L. Rilander
Managing Director

By: _____
Carole Lewis Anderson
Managing Director

Agreed to as of March 20, 1984

ATLANTIC FEDERAL SAVINGS
AND LOAN ASSOCIATION
OF FORT LAUDERDALE

By: _____

EXHIBIT "B"

INTEREST EXCHANGE AGREEMENT

INTEREST EXCHANGE AGREEMENT ("Agreement") dated as of March 23, 1984 between Atlantic Federal Savings and Loan Association ("Atlantic Federal") an association organized under the laws of the United States of America and Homestead Savings, a Federal Savings and Loan Association ("Homestead").

In consideration of the mutual agreements herein contained, the parties hereto agree as follows:

1. As used in this Agreement:

"Business Day" means the day on which Banks are open in New York for the transaction of business required for this Agreement.

"Early Termination Date" means a date designated pursuant to paragraph 4 hereof prior to the Termination Date.

"Fixed Amount" in respect of a Settlement Date means an amount equal to interest on the Notional Principal Amount calculated utilizing the Fixed Interest Rate for the relevant period and shall be equal to $2,100,000.00 in respect of each Settlement Date after March 23, 1984.

"Fixed Interest Rate" shall be a rate of 12.00% per annum based on a 360-day year and twelve 30-day months.

"Interest Period" means each period beginning on a Settlement Date (or, with respect to the first Interest Period, on March 23, 1984) and ending on the day immediately preceding the next Settlement Date.

"Net Termination Amount" has the meaning set forth in paragraph 4 hereof.

"Notional Principal Amount" means $35,000,000.

"Settlement Date" means September 23 and March 23 of each year prior to and including the Termination Date, commencing March 23, 1984, or, if any such day is not a Business Day, the next Business Day.

"Termination Date" means March 22, 1991, or, if such day is not a Business Day, the next Business Day.

"Variable Amount" in respect of a Settlement Date means an amount equal to interest calculated for the Interest Period immediately preceding such Settlement Date on the Notional Principal Amount in accordance with paragraph 2 hereof, utilizing the Variable Interest Rates in effect from time to time during such Interest Period. Interest shall be calculated on the basis of a 360-day year and twelve 30-day months.

"Variable Interest Rate" has the meaning set forth in paragraph 2 hereof.

"Weighted Average Per Annum Discount Rate" means a rate computed by dividing the total discount for a United States Treasury bill auction (total net proceeds subtracted from the full face value at maturity date) by the full face value and multiplying the quotient by 360 days divided by the number of days the Treasury bill is to be outstanding.

2. The Variable Interest Rate shall be equal to the simple average of the Weighted Average Per Annum Discount Rate (expressed on a bond equivalent basis for

a 365 or 366 day year and rounded to three decimal places) of all auctions of direct obligations of the United States having a maturity of ninety-one days ("91-day Treasury bills") occurring between Settlement Dates, as published by the Board of Governors of the Federal Reserve System or as reported by the Department of the Treasury including the results of the auction, if any, which took place on the prior Settlement Date, but excluding the results of the auction occurring on the current Settlement Date. If a 91-day Treasury Bill auction occurs on the first day of the first Interest Period, the results of that auction will be included in the average rate.

3. *Interest Exchange.* (a) On every Settlement Date, Homestead shall determine, and shall certify to Atlantic Federal, the difference between the Fixed Amount ("A") for such Settlement Date and the Variable Amount ("B") for such Settlement Date. If, as so determined, A is less than B, Homestead shall on the tenth day after such Settlement Date (or the next Business Day if such day is not a Business Day) pay a sum equal to the difference to Atlantic Federal at Federal Reserve Board of Miami, Account Number 267083763; and if, as so determined, B is less than A, Atlantic Federal shall on the tenth day after such Settlement Date (or the next Business Day if such day is not a Business Day) pay a sum equal to the difference to Homestead at Manufacturers Hanover Trust Company, Account Number 144096697. If, as so determined, there is no such difference, Homestead shall so certify in writing to Atlantic Federal and the parties will be treated as having performed their relevant obligations for the purposes of this paragraph 3 without any payment having to be made.

(b) Should Homestead fail to deliver the determination referred to in subparagraph 3(a) to Atlantic Federal by the Third Business day after any settlement date,

Atlantic Federal shall make the determination and certify it to Homestead. In that event, the payment required by subparagraph 3(a) still will be due and payable at the time provided in subparagraph 3(a).

(c) All payments under this Agreement shall be made in U.S. dollars in immediately available funds.

4. *Early Termination.* (a) Either Atlantic Federal or Homestead (the "Designator") may designate as the Early Termination Date any Business Day prior to the Termination Date which falls within thirty days after a day on which any of the following events shall have occurred and shall be continuing with respect to the other party (the "Designee"): (i) the Designee has failed to make a payment required under Paragraph 3(a) of this Agreement and has not remedied such default within a period of five Business Days of notice of such default having been received from the Designator; or (ii) the Designee has become insolvent or Bankrupt or admits in writing its inability to pay its debts as they mature, or taken any action for the purpose of entering into a winding-up, dissolution, Bankruptcy, reorganization, or similar proceeding analogous in purpose or effect, or any order has been made by any competent court or any resolution passed for the appointment of a liquidator or trustee in Bankruptcy of the Designee or the Designee has appointed or suffered to be appointed any receiver or trustee of the whole or any material part of its assets or business, or has entered into any composition with its general creditors; or (iii) any indebtedness in respect of borrowed money of the Designee is declared to be due and payable prior to its stated maturity by reason of any default by the Designee in the performance or observance of any obligation or condition, or any such indebtedness of the Designee is not paid when due (after giving effect to any applicable grace period).

(b) Designation of the Early Termination Date shall be accomplished by the Designator giving written notice thereof which notice shall be received by the Designee not less than seven Business Days prior to the date so designated and which shall specify in reasonable detail the basis upon which it is given.

(c) In the event that either Atlantic Federal or Homestead shall serve upon the other a notice pursuant to clause (b) above, the Designator shall:

(i) determine a "discount rate", as of the second Business Day prior to the Early Termination Date equal to the yield to maturity, on a bond equivalent basis, of Treasury Notes issued by the United States Government due on the Termination Date or the maturity date nearest thereto. In the event more than one such Treasury Note issue matures on the Termination Date (or nearest date thereto), the yield on the Treasury Notes which have a market value nearest to par value shall be used.

(ii) calculate a "fixed rate termination amount" equal to the sum of each of (1) the amounts due on each remaining Settlement Date discounted to the Early Termination Date using the rate determined under sub-clause (i) above and (2) the Fixed Amount which is unpaid from the most recent Settlement Date.

(iii) calculate a "variable rate termination amount" equal to the sum of (1) the "Unpaid Variable Amount", (2) the "interim Variable Amount" and (3) the "Subsequent Variable Amount" such that:

(1) the Unpaid Variable Amount is the amount unpaid from the most recent Settlement Date.

(2) the Interim Variable Amount pertains to the period between the most recent Settlement Date and the next Settlement Date and equals the total of amounts (A) plus (B) such that:

(A) is an amount accrued for the number of days in the period beginning on the most recent Settlement Date and ending on and including the Early Termination Date, ("elapsed days") calculated by dividing 360 into the product of the Variable Interest Rate in effect during such period multiplied by both the Notional Principal Amount and the elapsed days and,

(B) is an amount accrued for the period from the day following the Early Termination Date and ending the day prior to the next Settlement Date calculated by dividing 360 into the product of the Notional Principal Amount multiplied by the remaining days in the period (180 days minus elapsed days) and the discount rate established in sub-clause (i) above and

(3) Subsequent Variable Amount pertains to amounts due on each Settlement Date subsequent to the next Settlement Date and is equal to one-half of the product of the Notional Principal Amount times the discount rate determined in sub-clause (i) above discounted to the Early Termination Date using the discount rate determined under sub-clause (i) above.

(iv) calculate a "Net Termination Amount" which shall be equal to the difference between the amount computed in sub-clauses (ii) and (iii) above,

and shall be in favor of Homestead if (ii) is greater than (iii) and shall be in favor of Atlantic Federal if (iii) is greater than (ii).

And the Designee shall, without prejudice to any other amounts due or payable hereunder, pay to the Designator not later than two Business Days subsequent to a demand in writing therefor (which demand shall be not earlier than the second Business Day prior to the Early Termination Date) the Net Termination Amount, if the same is in favor of the Designator, it being understood that the Designator shall in no event be obliged to pay the Net Termination Amount, even if the same is in favor of the Designee, to the Designee.

(d) The parties hereto agree that the amounts recoverable by the Designator pursuant to clause (c) of this paragraph 4 are a reasonable pre-estimate of the Designator's loss and are not a penalty; such amounts are payable as liquidated damages to the Designator for the loss of its bargain and the loss of its protection against future risks; and (without prejudice, however, to the rights and remedies of the Designator hereunder in respect of any other breach of this Agreement or as otherwise specifically provided herein) the Designator shall not be entitled to recover any additional damages hereunder as a consequence of such losses; and the parties further agree that a statement in reasonable detail by the Designator showing the calculation of the foregoing amounts shall be conclusive in the absence of manifest error.

5. *Representations and Warranties.* To induce the other party to enter into this Agreement, Atlantic Federal represents and warrants that it is an entity organized and duly existing under the laws of the United States of America, and Homestead represents and warrants that it is an entity organized and duly existing under the laws of

the United States of America, and Atlantic Federal and Homestead each represent, warrant and covenant with respect to itself that: (a) it is duly authorized by all necessary corporate action to execute, deliver and perform this Agreement; (b) the execution, delivery and performance of this Agreement does not conflict with any provisions of the charter or bylaws (or equivalent constituent documents) of such party or of any agreement binding upon it; and (c) none of the events (without regard to any provision requiring the lapse of time or giving of notice or both) specified in clause (a) of paragraph 4 hereof has occurred and is continuing, and it will notify the other party promptly upon it becoming aware of any such event.

6. All payments made hereunder shall be made without any set-off or counterclaim (other than a set-off or counterclaim arising from a default by the other party in the performance of its obligations hereunder).

7. The rights (including without limitation the rights under paragraph 4 hereof) and remedies herein provided are cumulative and not exclusive of any rights and remedies provided by law and shall not affect or impair any right to which any party may be entitled by law.

8. In the event it shall be or become unlawful for either party to perform its obligations hereunder as a result of existing or future laws or regulations then either party may in its sole discretion give notice to the other party specifying such circumstances and declaring the obligations of the parties hereto as provided in this Agreement to be terminated as of the date specified in such notice; *provided, however*, that such termination shall not release either party from its obligations accrued and due hereunder as of the date of such notice. In the event of such termination, the parties' rights and obligations will be determined as outlined in paragraph 4

herein, with the party whose conduct is unlawful being the designee.

9. Any notice to be given hereunder shall be given in writing and shall be deemed to have been given (except as otherwise expressly set forth herein) if given by registered mail four days after posting. Any notice shall be addressed and sent to Atlantic Federal, Attention: James J. Hunter; and to Homestead Attention: John P. Halicky.

10. No failure or delay in exercising any right, power or privilege hereunder shall operate as a waiver thereof nor shall any single or partial exercise of any right, power or privilege preclude any other or further exercise thereof, or the exercise of any other right, power or privilege.

11. This Agreement shall be governed by and construed in accordance with the laws of the State of New York.

12. This Agreement may be executed in counterparts, each of which shall be deemed an original.

13. This Agreement may not be assigned by either party hereto, without the prior written consent of the other party hereto and any purported assignment without such consent shall be void.

14. In the event of any action or proceeding in regard to the subject matter of this contract, the prevailing party shall be entitled to recover its reasonable costs and attorney's fees.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the date first above written.

ATLANTIC FEDERAL SAVINGS
AND LOAN ASSOCIATION

By _____
Title:

HOMESTEAD SAVINGS

By _____
Title:
John P. Halicky
Senior Vice President

EXHIBIT "C"

INTEREST EXCHANGE AGREEMENT

INTEREST EXCHANGE AGREEMENT ("Agreement") dated as of August 3, 1984 between Atlantic Federal Savings and Loan Association ("Atlantic Federal") an association organized under the laws of the United States of America and Homestead Savings, a Federal Savings and Loan Association ("Homestead").

In consideration of the mutual agreements herein contained, the parties hereto agree as follows:

1. As used in this Agreement:

"Business Day" means the day on which Banks are open in New York for the transaction of business required for this Agreement.

"Early Termination Date" means a date designated pursuant to paragraph 4 hereof prior to the Termination Date.

"Fixed Amount" in respect of a Settlement Date means an amount equal to interest on the Notional Principal Amount calculated utilizing the Fixed Interest Rate for the relevant period and shall be equal to $3,112,500.00 in respect of each Settlement Date after August 3, 1984.

"Fixed Interest Rate" shall be a rate of 12.45% per annum based on a 360-day year and twelve 30-day months.

"Interest Period" means each period beginning on a Settlement Date (or, with respect to the first Interest Period, on August 3, 1984) and ending on the day immediately preceding the next Settlement Date.

"Net Termination Amount" has the meaning set forth in paragraph 4 hereof.

"Notional Principal Amount" means $50,000,000.

"Settlement Date" means February 3 and August 3 of each year prior to and including the Termination Date, commencing August 3, 1984, or, if any such day is not a Business Day, the next Business Day.

"Termination Date" means August 2, 1989, or, if such day is not a Business Day, the next Business Day.

"Variable Amount" in respect of a Settlement Date means an amount equal to interest calculated for the Interest Period immediately preceding such Settlement Date on the Notional Principal Amount in accordance with paragraph 2 hereof, utilizing the Variable Interest Rates in effect from time to time during such Interest Period. Interest shall be calculated on the basis of a 360-day year and twelve 30-day months.

"Variable Interest Rate" has the meaning set forth in paragraph 2 hereof.

"Weighted Average Per Annum Discount Rate" means a rate computed by dividing the total discount for a United States Treasury bill auction (total net proceeds subtracted from the full face value at maturity date) by the full face value and multiplying the quotient by 360 days divided by the number of days the Treasury bill is to be outstanding.

2. The Variable Interest Rate shall be equal to the simple average of the Weighted Average Per Annum Discount Rate (expressed on a bond equivalent basis for

a 365 or 366 day year and rounded to three decimal places) of all auctions of direct obligations of the United States having a maturity of ninety-one days ("91-day Treasury bills") occurring between Settlement Dates, as published by the Board of Governors of the Federal Reserve System or as reported by the Department of the Treasury including the results of the auction, if any, which took place on the prior Settlement Date, but excluding the results of the auction occurring on the current Settlement Date. If a 91-day Treasury Bill auction occurs on the first day of the first Interest Period, the results of that auction will be included in the average rate.

3. *Interest Exchange.* (a) On every Settlement Date, Homestead shall determine, and shall certify to Atlantic Federal, the difference between the Fixed Amount ("A") for such Settlement Date and the Variable Amount ("B") for such Settlement Date. If, as so determined, A is less than B, Homestead shall on the tenth day after such Settlement Date (or the next Business Day if such day is not a Business Day) pay a sum equal to the difference to Atlantic Federal at Federal Reserve Board of Miami, Account Number 267083763; and if, as so determined, B is less than A, Atlantic Federal shall on the tenth day after such Settlement Date (or the next Business Day if such day is not a Business Day) pay a sum equal to the difference to Homestead at Manufacturers Hanover Trust Company, Account Number 144096697. If, as so determined, there is no such difference, Homestead shall so certify in writing to Atlantic Federal and the parties will be treated as having performed their relevant obligations for the purposes of this paragraph 3 without any payment having to be made.

(b) Should Homestead fail to deliver the determination referred to in subparagraph 3(a) to Atlantic Federal by the Third Business day after any settlement date,

Atlantic Federal shall make the determination and certify it to Homestead. In that event, the payment required by subparagraph 3(a) still will be due and payable at the time provided in subparagraph 3(a).

(c) All payments under this Agreement shall be made in U.S. dollars in immediately available funds.

4. *Early Termination.* (a) Either Atlantic Federal or Homestead (the "Designator") may designate as the Early Termination Date any Business Day prior to the Termination Date which falls within thirty days after a day on which any of the following events shall have occurred and shall be continuing with respect to the other party (the "Designee"): (i) the Designee has failed to make a payment required under Paragraph 3(a) of this Agreement and has not remedied such default within a period of five Business Days of notice of such default having been received from the Designator; or (ii) the Designee has become insolvent or Bankrupt or admits in writing its inability to pay its debts as they mature, or taken any action for the purpose of entering into a winding-up, dissolution, Bankruptcy, reorganization, or similar proceeding analogous in purpose or effect, or any order has been made by any competent court or any resolution passed for the appointment of a liquidator or trustee in Bankruptcy of the Designee or the Designee has appointed or suffered to be appointed any receiver or trustee of the whole or any material part of its assets or business, or has entered into any composition with its general creditors; or (iii) any indebtedness in respect of borrowed money of the Designee is declared to be due and payable prior to its stated maturity by reason of any default by the Designee in the performance or observance of any obligation or condition, or any such indebtedness of the Designee is not paid when due (after giving effect to any applicable grace period).

(b) Designation of the Early Termination Date shall be accomplished by the Designator giving written notice thereof which notice shall be received by the Designee not less than seven Business Days prior to the date so designated and which shall specify in reasonable detail the basis upon which it is given.

(c) In the event that either Atlantic Federal or Homestead shall serve upon the other a notice pursuant to clause (b) above, the Designator shall:

(i) determine a "discount rate", as of the second Business Day prior to the Early Termination Date equal to the yield to maturity, on a bond equivalent basis, of Treasury Notes issued by the United States Government due on the Termination Date or the maturity date nearest thereto. In the event more than one such Treasury Note issue matures on the Termination Date (or nearest date thereto), the yield on the Treasury Notes which have a market value nearest to par value shall be used.

(ii) calculate a "fixed rate termination amount" equal to the sum of each of (1) the amounts due on each remaining Settlement Date discounted to the Early Termination Date using the rate determined under sub-clause (i) above and (2) the Fixed Amount which is unpaid from the most recent Settlement Date.

(iii) calculate a "variable rate termination amount" equal to the sum of (1) the "Unpaid Variable Amount", (2) the "Interim Variable Amount" and (3) the "Subsequent Variable Amount" such that:

(1) the Unpaid Variable Amount is the amount unpaid from the most recent Settlement Date.

(2) the Interim Variable Amount pertains to the period between the most recent Settlement Date and the next Settlement Date and equals the total of amounts (A) plus (B) such that:

(A) is an amount accrued for the number of days in the period beginning on the most recent Settlement Date and ending on and including the Early Termination Date, ("elapsed days") calculated by dividing 360 into the product of the Variable Interest Rate in effect during such period multiplied by both the Notional Principal Amount and the elapsed days and,

(B) is an amount accrued for the period from the day following the Early Termination Date and ending the day prior to the next Settlement Date calculated by dividing 360 into the product of the Notional Principal Amount multiplied by the remaining days in the period (180 days minus elapsed days) and the discount rate established in sub-clause (i) above and

(3) Subsequent Variable Amount pertains to amounts due on each Settlement Date subsequent to the next Settlement Date and is equal to one-half of the product of the Notional Principal Amount times the discount rate determined in sub-clause (i) above discounted to the Early Termination Date using the discount rate determined under sub-clause (i) above.

(iv) calculate a "Net Termination Amount" which shall be equal to the difference between the amounts computed in sub-clauses (ii) and (iii)

above, and shall be in favor of Homestead if (ii) is greater than (iii) and shall be in favor of Atlantic Federal if (iii) is greater than (ii).

And the Designee shall, without prejudice to any other amounts due or payable hereunder, pay to the Designator not later than two Business Days subsequent to a demand in writing therefor (which demand shall be not earlier than the second Business Day prior to the Early Termination Date) the Net Termination Amount, if the same is in favor of the Designator, it being understood that the Designator shall in no event be obliged to pay the Net Termination Amount, even if the same is in favor of the Designee, to the Designee.

(d) The parties hereto agree that the amounts recoverable by the Designator pursuant to clause (c) of this paragraph 4 are a reasonable pre-estimate of the Designator's loss and are not a penalty; such amounts are payable as liquidated damages to the Designator for the loss of its bargain and the loss of its protection against future risks; and (without prejudice, however, to the rights and remedies of the Designator hereunder in respect of any other breach of this Agreement or as otherwise specifically provided herein) the Designator shall not be entitled to recover any additional damages hereunder as a consequence of such losses; and the parties further agree that a statement in reasonable detail by the Designator showing the calculation of the foregoing amounts shall be conclusive in the absence of manifest error.

5. *Representations and Warranties.* To induce the other party to enter into this Agreement, Atlantic Federal represents and warrants that it is an entity organized and duly existing under the laws of the United States of America, and Homestead represents and warrants that it is an entity organized and duly existing under the laws of

the United States of America, and Atlantic Federal and Homestead each represent, warrant and covenant with respect to itself that: (a) it is duly authorized by all necessary corporate action to execute, deliver and perform this Agreement; (b) the execution, delivery and performance of this Agreement does not conflict with any provisions of the charter or bylaws (or equivalent constituent documents) of such party or of any agreement binding upon it; and (c) none of the events (without regard to any provision requiring the lapse of time or giving of notice or both) specified in clause (a) of paragraph 4 hereof has occurred and is continuing, and it will notify the other party promptly upon it becoming aware of any such event.

6. All payments made hereunder shall be made without any set-off or counterclaim (other than a set-off or counterclaim arising from a default by the other party in the performance of its obligations hereunder).

7. The rights (including without limitation the rights under paragraph 4 hereof) and remedies herein provided are cumulative and not exclusive of any rights and remedies provided by law and shall not affect or impair any right to which any party may be entitled by law.

8. In the event it shall be or become unlawful for either party to perform its obligations hereunder as a result of existing or future laws or regulations then either party may in its sole discretion give notice to the other party specifying such circumstances and declaring the obligations of the parties hereto as provided in this Agreement to be terminated as of the date specified in such notice; *provided, however,* that such termination shall not release either party from its obligations accrued and due hereunder as of the date of such notice. In the event of such termination, the parties' rights and obligations will be determined as outlined in paragraph 4

herein, with the party whose conduct is unlawful being the designee.

9. Any notice to be given hereunder shall be given in writing and shall be deemed to have been given (except as otherwise expressly set forth herein) if given by registered mail four days after posting. Any notice shall be addressed and sent to Atlantic Federal, Attention: James J. Hunter; and to Homestead Attention: John P. Halicky.

10. No failure or delay in exercising any right, power or privilege hereunder shall operate as a waiver thereof nor shall any single or partial exercise of any right, power or privilege preclude any other or further exercise thereof, or the exercise of any other right, power or privilege.

11. This Agreement shall be governed by and construed in accordance with the laws of the State of New York.

12. This Agreement may be executed in counterparts, each of which shall be deemed an original.

13. This Agreement may not be assigned by either party hereto, without the prior written consent of the other party hereto and any purported assignment without such consent shall be void.

14. In the event of any action or proceeding in regard to the subject matter of this contract, the prevailing party shall be entitled to recover its reasonable costs and attorney's fees.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the date first above written.

ATLANTIC FEDERAL SAVINGS
AND LOAN ASSOCIATION

By _____
Title:

HOMESTEAD SAVINGS

By _____
Title:

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY THAT a true and correct copy of the foregoing was served by first class mail this 30th day of September, 1992, upon counsel of record as follows:

EUGENE E. STEARNS, ESQ.
Stearns Weaver Miller Weissler Alhadeff
& Sitterson, P.A.
2200 Museum Tower
150 West Flagler Street
Miami, Florida 33130

JORDEN SCHULTE &
BURCHETTE

By: _____

DESIGNATION OF CORPORATE RELATIONSHIPS

The following is a list of all subsidiaries PaineWebber Incorporated, as well as for any of the corporations listed herein:

AIR TRANSPORT LEASING, INC.
AJ CORPORATION
ATL, INC.
BEDCO LEASING COMPANY, INC.
BEPWI SUB, INC.
BLYTH EASTMAN PAINE WEBBER SERVICING INC.
CAPITAL INVESTMENT & TRUST COMPANY
CHANNELVIEW LEASING COMPANY, INC.
CORRESPONDENCE SERVICES CORPORATION
CT MONROE CORPORATION
DEDICATED PARTNERS INC.
EIGHTH INCOME PROPERTIES, INC.
FIFTH INCOME PROPERTIES, INC.
FIFTH MORTGAGE PARTNERS, INC.
FIRST EQUITY PARTNERS, INC.
FIRST INCOME PROPERTIES FUND, INC.
FIRST INSURED MORTGAGE PARTNERS, INC.
FIRST OPPORTUNITY PARTNERS, INC.
FIRST PW CROW PROPERTIES, INC.
FIRST PW GROWTH PROPERTIES, INC.
FIRST QUALIFIED PROPERTIES, INC.
FOURTH DEVELOPMENT FUND, INC.
FOURTH INCOME PROPERTIES, INC.
FOURTH QUALIFIED PROPERTIES, INC.
GENERAL EQUIPMENT MANAGEMENT, INC.
HARBORSIDE INSURANCE COMPANY HOLDINGS INC.

HARBORVIEW CORPORATION
HOMESTEAD SAVINGS, F.S.B.
KATELLA REALTY CORPORATION
MAIDEN LANE LEASING CORPORATION
MEZZANINE CAPITAL CORPORATION
MITCHELL HUTCHINS ASSET MANAGEMENT INC.
MITCHELL HUTCHINS INSTITUTIONAL INVESTORS, INC.
PAINE HORNELL CORPORATION
PAINE WEBBER AIRCRAFT LEASING INC.
PAINE WEBBER (ASIA) LTD.
PAINE WEBBER BERMUDA LTD.
PAINE WEBBER CHAIRMAN'S INC.
PAINE WEBBER DEVELOPMENT, INC.
PAINE WEBBER FUNDING INC.
PAINE WEBBER FUTURES MANAGEMENT CORPORATION
PAINE WEBBER I. B. HOLDINGS INC.
PAINE WEBBER INCORPORATED OF PUERTO RICO
PAINE WEBBER INTERNATIONAL CAPITAL INC.
PAINE WEBBER LEASING CORPORATION
PAINE WEBBER LONDON HOLDINGS
PAINE WEBBER NIPPON LTD.
PAINE WEBBER PROPERTIES INCORPORATED
PAINE WEBBER REAL ESTATE SECURITIES INC.
PAINE WEBBER REALTY INVESTMENTS INCORPORATED
PAINEWEBBER ADVERTISING ASSOCIATES INC.
PAINEWEBBER AIRCRAFT DEPOSITORY INC.

PAINEWEBBER (B.C.) LIMITED
PAINEWEBBER CAPITAL, INC.
PAINEWEBBER COMMODITIES LIMITED
PAINEWEBBER DEPOSITARY CORPORATION
PAINEWEBBER DIAGNOSTIC, INC.
PAINEWEBBER EMPLOYEE INVESTMENTS MANAGEMENT INC.
PAINEWEBBER FINANCIAL TRADING LIMITED
PAINEWEBBER FRANCE SA
PAINEWEBBER GOLF ADMINISTRATOR, INC.
PAINEWEBBER IBD INC.
PAINEWEBBER INCORPORATED
PAINEWEBBER INTERNATIONAL (ASIA) LTD.
PAINEWEBBER INTERNATIONAL BANK LTD.
PAINEWEBBER INTERNATIONAL BANKING CORPORATION
PAINEWEBBER INTERNATIONAL DEVELOPMENT LTD.
PAINEWEBBER INTERNATIONAL FUTURES (ASIA) LTD.
PAINEWEBBER INTERNATIONAL FUTURES LIMITED
PAINEWEBBER INTERNATIONAL (GREECE) LTD.
PAINEWEBBER INTERNATIONAL INC.
PAINEWEBBER INTERNATIONAL (JAPAN) LTD.
PAINEWEBBER INTERNATIONAL (LONDON) LTD.
PAINEWEBBER INTERNATIONAL OVERSEAS LIMITED
PAINEWEBBER INTERNATIONAL, S.A.

PAINEWEBBER INTERNATIONAL (U.K.) LTD.
PAINEWEBBER INVESTMENTS HOLDINGS INC.
PAINEWEBBER INVESTMENTS INC.
PAINEWEBBER LIFE HOLDINGS INC.
PAINEWEBBER MORTGAGE ACCEPTANCE INC. III
PAINEWEBBER MORTGAGE ACCEPTANCE INC. IV
PAINEWEBBER MORTGAGE FINANCE HOLDING CO.
PAINEWEBBER MORTGAGE FINANCE, INC.
PAINEWEBBER PARTNERS INC.
PAINEWEBBER PROGRAMMED AMORTIZATION TERM SECURITIES INC.
PAINEWEBBER SPECIALISTS INCORPORATED
PAINEWEBBER T.C., INC.
PAINEWEBBER TRADING INC.
PAINEWEBBER UK HOLDINGS
PAINEWEBBER (UK) PENSION TRUSTEES LIMITED
PAINEWEBBER VENTURE MANAGEMENT INC.
PW CAPITOL CORPORATION
PW CHAMPLAIN CORPORATION
PW CLOVER HOLDINGS I, INC.
PW CLOVER HOLDINGS II, INC.
PW CLOVER INC.
PW ENTERTAINMENT INC.
PW FAWCETT CORPORATION
PW FITCHBURG CORPORATION
PW FRANKLIN CORPORATION
PW FREMONT CORPORATION
PW GENEVA CORPORATION

PW HAMILTON CORPORATION
PW IDLEWILD CORPORATION
PW INSURANCE AGENCY
(ARKANSAS) INCORPORATED
PW AGENCY OF PUERTO RICO, INC.
PW INSURANCE AGENCY
(OHIO) INCORPORATED
PW INTERNATIONAL INCORPORATED OF
PUERTO RICO
PW KATELLA CORPORATION
PW LINCOLN HARBOR INC.
PW MAIN CORPORATION
PW McCULLOUGH CORPORATION
PW NORTHWESTERN CORPORATION
PW PARTNERSHIPS
PW PLAZA CORPORATION
PW SHELTER FUND, INC.
PW SPRING MOUNTAIN CORPORATION
PW TREASURY FUNDING INC.
PW TRUST COMPANY
PW WESTVILLE CORPORATION
PWDC HOLDING COMPANY
PWJC INSURANCE SALES (ARIZONA)
INCORPORATED
PWJC INSURANCE SALES INCORPORATED
PQJC INSURANCE SALES
(MASSACHUSETTS) INC.
PWJC INSURANCE SALES (MONTANA) INC,
PWJC INSURANCE SALES (WYOMING) INC.
PWJC INSURANCE SERVICES
(ILLINOIS) INC.
PWJC SALES AGENCY INCORPORATED
PWPR CORPORATION
REALTY SOUTHWEST INVESTMENT
GROUP INC.

REALTY SOUTHWEST INVESTMENT GROUP III INC.
REALTY SOUTHWEST SERVICES INC.
REGIONAL S & L INVESTORS, INC.
RM BRANFORD CORPORATION
RMA INSURANCE CO.
RML LEASING CORPORATION
RMM CORPORATION
RMZ CORPORATION
ROTAN MOSLE ENERGY DEVELOPMENT INC.
ROTAN MOSLE ENERGY INC.
ROTAN MOSLE FINANCIAL CORP.
ROTAN MOSLE INSURANCE AGENCY, INC.
ROTAN MOSLE INVESTMENTS INC.
ROTAN MOSLE INVESTMENT VENTURES INC.
ROTAN MOSLE LEASING COMPANY
ROTAN MOSLE REALTY ADVISORS, INC.
ROTAN MOSLE REALTY ASSOCIATES, INC.
ROTAN MOSLE REALTY INVESTMENTS, INC.
ROTAN MOSLE TECHNOLOGY, INC.
SECOND EQUITY PARTNERS, INC.
SECOND INCOME PROPERTIES, INC.
SECOND PW GROWTH PROPERTIES, INC.
SECOND QUALIFIED PROPERTIES, INC.
SEVENTH INCOME PROPERTIES
SIXTH AVENUE REALTY CORPORATION
SIXTH INCOME PROPERTIES, INC.
THIRD EQUITY PARTNERS, INC.
THIRD INCOME PROPERTIES, INC.
THIRD PW GROWTH PROPERTIES, INC.
THIRD QUALIFIED PROPERTIES, INC.

TRAVEL PLAZA MANAGEMENT, INC.
WALL STREET REALTY CORPORATION
WYODAK CONSTRUCTION CO. INC.

Respectfully submitted,

JORDEN SCHULTE &
BURCHETTE
701 Brickell Avenue
Miami, Florida 33131
Telephone: (305) 371-2600

John H. Schulte
Counsel of Record

Counsel for Petitioner
PaineWebber Incorporated